

*How Defense Counsel Can
Change the Common Law of Torts:*
**Moving Toward The Fully
Informed Jury**



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Note to the Reader: This practice guide has been prepared as a companion to "Moving Toward the Fully Informed Jury", a substantive article published by The Georgetown Journal of Law and Public Policy, Vol. 3, No. 1, Winter 2005. The purpose of this guide is to help defense counsel pursue opportunities to seek changes in common law rules to bring them up to date and ensure that civil justice laws fairly serve both plaintiffs and defendants. Counsel are encouraged to freely utilize these ideas and tailor this material to further their trial purposes. A copy of the full law journal article can be downloaded from www.AmericanJusticePartnership.org. On the left home page menu, click on "Law Journal Articles" to access the download. Copyright 2005 Steven B. Hantler, Victor E. Schwartz and Leah Lorber.

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Introduction

There is an excellent, but often overlooked, opportunity to accomplish civil justice reform – through the judicial system. While most people think of tort reform as a matter for the legislature, tort reform can be accomplished through the courts. It usually can be done more cheaply, quickly and effectively. Judges have created more than 95 percent of tort law in the United States through appellate opinions. They can develop the law through the common law process for both plaintiffs and defendants.

Corporate counsel can be a driving force to encourage outside counsel to consider tort reform in the courts. Outside counsel can bring such opportunities to the attention of their clients. The effort takes imagination, persistence and resourcefulness. This monograph will show how and why it can be done.

In that regard, plaintiffs' personal injury lawyers have made the most out of the opportunity to change the law through the common law system. They have pushed the boundaries of law to create new ways to sue and persuade courts to limit affirmative defenses. For example, personal injury lawyers have successfully argued for changes in a number of states to abolish the contributory negligence defense¹ and to create new ways to sue for claims such as medical monitoring² and public nuisance.³ If personal

1 *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (first state supreme court to adopt comparative negligence doctrine absent state legislation); Li v. Yellow Cab Co. of California, 532 P.2d 1226 (Cal. 1975) (adopting comparative negligence doctrine); Kaatz v. State, 540 P.2d 1037 (Alaska 1975) (same).

2 *See, e.g.*, Bower v. Westinghouse Corp., 522 S.E.2d 424, (W. Va. 1999) (allowing cause of action for medical monitoring); Redland Soccer Club, Inc., v. Dep't of the Army, 696 A.2d 137 (Pa. 1997) (same); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993) (same).

3 Most courts have rejected these attempts. *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004); Spitzer v. Sturm, Ruger & Co., Inc., 309 A.D.2d 91 (N.Y. App. Div. 2003); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3rd Cir. 2002) (applying Pennsylvania law); Camden City Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3rd Cir. 2001) (applying New Jersey law); Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001); Penelas v. Arms Tech., Inc., 778 So. 2d 1042 (Fla. App. Ct. 2001). *But see* City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1233 (Ind. 2003) (defining an "interference with a public right" to include any "lawful activity conducted in such a manner that it imposes costs on others" and suggesting that "[i]f the marketplace values the product sufficiently to accept that cost, the manufacturer can price it into the product."); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1142 (Ohio 2002) (stating that "a public- nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or

injury lawyers have a near-monopoly over fostering legal change in the courts, it is not surprising that the law has become more and more pro-plaintiff over time. This trend will continue, but it does not have to do so.

The Creation Of Tort Law Should Not Be A Monopoly For Plaintiffs' Lawyers

The "creation" of new tort law is not and should not be the sole province of personal injury lawyers. Defense counsel can accomplish the same thing. Some corporations and other defendants have worked with their outside counsel to show that they can create rules by the common law process in the courts, in effect, "tort reform by judges." Two examples include: 1) raising the standard for the assessment of punitive damages from "a preponderance of the evidence" to "clear and convincing evidence"⁴ and 2) tightening the standard as to when punitive damages can be awarded for "actual malice."⁵ This monograph will discuss others.

Tort reform in the courts does not conflict with the doctrine of stare decisis, which states that in general courts should adhere to precedent. It also does not conflict with the general position of civil justice reform groups that judges should not be activists. This is why.

Tort reform in the courts only addresses rules that have been created by judges, not by legislators. In that regard, when colonies became states, state legislators delegated to courts the power to create tort law in light of the common law of England at the time, and wisdom and experience then and in the future.⁶ Once a rule of tort law is created, the doctrine of stare decisis suggests that the precedent should be followed, but stare decisis is not a doctrine of everlasting cement. When reasons for a rule have changed, examples of which will be set forth in this manual, the rules should change. This type of change is appropriate in the growth of the common law, whether it helps plaintiffs or defendants. The evolution of tort law of this type is natural. Development of this type of law under neutral principles of stare decisis should be distinguished from activist changes made by judges who are injecting their own public policy views into the common law system. This has occurred, at times, when judges have made sudden, 180° turns in the law on behalf of plaintiffs, when the policy reasons for precedents still rings true. For example, attempts to allow a person a claim where she or he has not been in-

sale of the product unreasonably interferes with a right common to the general public").

4 See, e.g., *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Tuttel v. Raymond*, 494 A.2d 1353 (Me. 1985); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980).

5 See, e.g., *Owens-Illinois Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992) (requiring clear and convincing evidence that defendant acted with actual malice).

6 See Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. (2001).

jured, recently have been rejected by state courts.⁷

As Samuel Warren and Louis Brandeis wrote in an influential 1890 article: “[T]he common law, in its eternal youth, grows to meet the demands of society.”⁸ Defense lawyers can use this well-recognized principle to persuade judges to change and update tort law so it better reflects the realities of the way people live and work today.⁹

An Aid To Settlement

Even if the law is not changed, solid efforts to persuade judges to change outdated rules that impose unfair restrictions on defendants have and will cause plaintiffs’ attorneys to substantially reduce the amount of their settlement demands. Plaintiffs’ counsel would need to research and respond to such arguments, which may be outside of their expertise in ordinary trial practice. Creation of an appealable issue that could have a broad impact on state law promotes favorable settlements. Some plaintiffs’ lawyers would not want to risk being the person involved in a case where a state supreme court had changed the law for the defendant. In other words, it is a win-win proposition in the right court at the right time to try to bring about tort reform in the courts.

This monograph serves as a “how-to manual” for achieving tort reform in the courts. It sets forth model materials for advancing the common law at the trial level. It also provides a helpful sample of five areas where defendants can make positive changes in the common law: each provides for more fully informed juries. This checklist should be supplemented by referring to our article *Moving Toward the Fully Informed Jury*, which was recently published in the Georgetown Journal of Law and Public Policy.¹⁰ That article provides substantive argument and case citations supporting changes in these areas of the law.

I. “Tort Reform In The Courts” – How Can This Be Done?

The effort to bring about tort reform in the courts must begin at the trial level. It is too late to raise such issues for the first time on appeal from a case.¹¹ While it is unlikely

7 See *Hinton v. Monsanto*, 813 So. 2d 827, 829 (Ala. 2001); *Wood v. Wyeth-Averest Labs.*, 82 S.W.3d 849, 855 (Ky. 2002); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); and *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440-41 (Nev. 2001).

8 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). This view is embraced by courts today. See, e.g., *Johnston v. KFC Nat’l Mgt. Co.*, 788 P.2d 159, 162 (Haw. 1990) (“The adaptability of the common law to the changing needs of passing time has been one of its most beneficent characteristics.”) (quoting with approval *Ely v. Murphy*, 540 A.2d 54, 57 (Conn. 1988)).

9 *White v. King*, 223 A.2d 763, 767 (Md. 1966) (“The doctrine of stare decisis, important as it is, is not to be construed as preventing us from changing a rule of law if we are convinced that the rule has become unsound in the circumstances of modern life.”).

10 Steven B. Hantler, Victor E. Schwartz, Cary Silverman & Emily Laird, *Moving Toward the Fully Informed Jury*, 3 GEO. J. OF L. & PUB. POL’Y 21 (2005).

11 *Newark Morning Ledger Co. v. United States*, 539 F.2d 929 (3rd Cir. 1976); *Richter v.*

that trial court judges would change settled principles of existing law, if challenges to those principles are clear, they can write and have written opinions that could then be appealed.

A “tort reform in the courts” initiative should begin by trial counsel filing a pre-trial motion requesting modifications to the law and providing solid background reasoning for those extensions. The specific type of motion and supporting papers would be governed by each state’s rules of civil procedure, but two likely vehicles for such a request are motions in limine and pre-trial briefs. If the issue requires the introduction of evidence, for example, whether to allow evidence of collateral source payments, trial counsel must make an offer of proof at trial to preserve his or her ability to appeal. Trial counsel can renew his or her requests for the extension of the common law when he or she proposes jury instructions, again providing solid support for the legal change requested. If the trial court denies these requests and defendant loses at trial, the defendant could appeal the issue in order to seek a positive ruling by an intermediate appellate court or the state supreme court.

Corporate and other defendants should pay attention to a number of important considerations before deciding whether to seek changes in the law through the courts.

First, defendants should determine whether efforts to enact tort reform through the courts would be compatible with the litigation strategy and budget for the specific case at hand. Corporate and outside counsel should work together to develop their strategy. In some cases, either in-house or outside counsel may need to consult with the defendant’s insurers as well, to ensure financial support for such efforts.

Second, the defendant and outside counsel should determine whether the change is truly needed in that state. They should look at the age and viability of case precedent and court practice, and whether the case at hand is the right vehicle factually in which to raise the issue. Similarly, both corporate and outside counsel should be sensitive to timing issues – for example, the impact on attempts at common law tort reform that potentially would be created by recent or ongoing media coverage of the case or legislative consideration of the issue. The impact will likely vary, depending on the facts of the case, the type and tone of media coverage, the public’s and legislature’s receptivity toward legislative proposals, and other factors.

Third, corporate and outside counsel should make sure that courts in the jurisdiction have authority to change the law. This is particularly important, for example, with attempts to change rules of evidence. Some state constitutions contain provisions that draw into question whether the state supreme court has the authority to change rules of evidence by itself, or whether such rules are to be established by the legislatures or

Hoglund, 132 F.2d 748 (7th Cir. 1943); *Cofer v. United States*, 256 F.2d 221 (8th Cir.), *cert. denied*, 358 U.S. 840 (1958); *Stevens v. United States*, 256 F.2d 619 (9th Cir. 1958); *Christiansen v. Farmers Ins. Exch.*, 540 F.2d 472 (10th Cir. 1976); *Pierre v. United States*, 525 F.2d 933 (5th Cir. 1976); *Miller v. Avirom*, 384 F.2d 319 (D.C. Cir. 1967).

by joint legislative-judicial action.¹² In these states, any efforts to significantly change evidentiary rules through the common law should be carefully considered and well-thought-out, to avoid wasting client resources, alienating potential political allies, or generally spinning one's wheels. Of course, counsel should double-check to see if the legislature has enacted statutes covering the issue, such as joint liability statutes or comparative fault schemes, or has delegated rule-making authority on the issue to the executive branch.

Fourth, corporate and outside counsel should consider the composition and preferences of the appellate courts in the state. Some state supreme courts are careful to defer to the legislature when it comes to making substantial changes in legal doctrine.¹³ Other state supreme courts are more willing to act on their own.¹⁴ In many cases, though, defense counsel are likely to be asking for changes in judicially created doctrines, such as the collateral source rule. When judges have clearly made the rules, they can modify them. Some appellate courts may tend to lean more toward plaintiffs' interests than defense interests, or vice versa.

In order to determine whether "tort reform in the courts" is appropriate in a particular case, we recommend that defendants and their outside counsel consult with national and local organizations that are concerned with the fair and balanced development of principles of civil justice law. They can supply powerful help with *amicus curiae* briefs if and when the issue is presented to appellate courts. Examples of these organizations at

12 See, e.g., Robert G. Lawson, *Interpretation of the Kentucky Rules of Evidence – What Happened to the Common Law?*, 87 Ky. L.J. 517 (1999). This article, written by one of the two principal drafters of the Kentucky Rules of Evidence, describes the difficulty in determining whether under the state constitution the Supreme Court of Kentucky, the Legislature, or both should promulgate state rules of evidence. While the state constitution explicitly delegates to the Supreme Court of Kentucky the authority to "prescribe ... rules of practice and procedure for the Court of Justice," the law of evidence is not considered to be exclusively procedural. See *id.* at 530. Lawson provides examples of evidentiary rules that implicate public policy decision making, such as rules of privilege, which "knowingly sacrifice the truth (or at least possible sources of it) because it is felt that some other public interest overrides the need for truth"; rape shield laws, dead man statutes, and spousal testimony laws. *Id.* at 530-31. The Kentucky Rules of Evidence ultimately were jointly developed and approved by the Kentucky Legislature and Supreme Court in the early 1990s. *Id.* at 532.

13 *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) (upholding legislative cap on economic damages in medical malpractice cases); *Etheridge v. Medical Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989) (same); *McDougall v. Schanz*, 597 N.W.2d 148 (Mich. 1999) (statute establishing standards for qualification of expert reflects a careful legislative balancing of public policy considerations beyond the competence of the judiciary to reevaluate).

14 *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057 (Ill. 1997) (going beyond instant case regarding legislative limit on pain and suffering damages and examining entire Civil Justice Reform Act of 1996; court struck down statutory pain and suffering damages limits and legislative reform of joint and several liability doctrine).

the national level include the American Tort Reform Association,¹⁵ the National Chamber Litigation Center at the Chamber of Commerce of the United States,¹⁶ the National Association of Manufacturers,¹⁷ and the American Justice Partnership.¹⁸ At the local level, groups such as the Illinois¹⁹ and Texas Civil Justice Leagues,²⁰ Citizens Against Lawsuit Abuse chapters,²¹ state Chambers of Commerce, and others can help provide valuable counsel.²²

Through filing *amicus curiae* briefs, these and other business and trade associations can help persuade state supreme courts to take cases raising tort reform in the courts and can provide broader public policy perspectives on the merits of the issues. The parties often are limited to the discussion of the applicable law and facts of their cases and have little room to address the implications of a decision for society at large. These groups also can get the word out in the media and the public about the need for a change in the law in a specific area.

II. Defendants And Past Successes With “Tort Reform In The Courts”

Here are some examples of how defendants have persuaded courts to bring the common law into line with the needs of modern day life.

A. Allowing The Jury To Be Informed Of The Effect Of Joint Liability

A defendant’s request for a jury instruction about the effect of joint and several liability resulted in an opinion by the Supreme Court of Hawaii changing the law of the state and adopting a rule that jurors may be informed of the way the doctrine works. The court’s ruling occurred in a drunken driving accident case, where the passenger sued the driver and the City of Honolulu for his injuries.²³

The defense counsel for the city, which was sued for allegedly failing to properly maintain its roadways, asked the trial judge to instruct the jury about the effect of joint and several liability.²⁴ Such an instruction would educate the jury that if it found the defendant ten percent, five percent, or even just one percent liable, that defendant may

15 See www.atra.org.

16 See www.uschamber.com/nclc/default.

17 See www.nam.org.

18 See www.americanjusticepartnership.com.

19 See www.icjl.org.

20 See www.tcjl.com.

21 See www.atra.org/links.php (providing links to Citizens Against Lawsuit Abuse and other state tort reform group websites).

22 See, e.g., State Partner link at www.americanjusticepartnership.com.

23 *Kaeko v. Davis*, 719 P.2d 387 (Haw. 1986).

24 *Id.* at 395.

be required to pay the entire judgment. The trial judge refused, but the city brought the case to the attention of the Supreme Court of Hawaii.

The Supreme Court of Hawaii overruled the trial judge. The court held that “an explanation of the operation of the doctrine of joint and several liability . . . may be necessary to enable the jury to make its findings on each issue.”²⁵ The court cited the opinions of influential scholars that courts should instruct jurors as to the correct impact of their factual decisions, something about which the jurors are apt to speculate, possibly incorrectly, otherwise.²⁶ The court said, “it would be ‘better for courts to be the vehicle by which the operation of the law is explained.’”²⁷

B. Creating A “Gatekeeper” Role For Trial Courts In Admission Of Expert Evidence

Defense counsel have successfully advocated for tightening the rules for admissibility of expert evidence and for expanding those rules from criminal to civil cases, including to mass products liability and toxic tort litigation.²⁸ According to Michael Green, Professor of Law at the University of Iowa, this change took place from the mid-1980s to the early 1990s in litigation over Merrell Dow Pharmaceuticals’ morning sickness drug, Bendectin.²⁹ The first Bendectin lawsuit was filed in 1977. By the mid-1980s, Green explained, more than 2,000 cases had been filed, plaintiffs were winning about half the cases, and there was increasingly “robust” scientific evidence that tended to exonerate Bendectin as a cause of birth defects. “The problem was a lack of causation and increasing scientific evidence that causation did not exist, but juries often reached contrary conclusions, sometimes spectacularly so,” he wrote.³⁰ The most popular tort reform legislation of the time, such as noneconomic damages caps and medical liability reform, could not solve this problem, he explained. To resolve this problem through briefing and arguments by defense counsel, lower courts agreed to adopt a more active role in examining the sufficiency of the scientific evidence linking Bendectin to birth defects.³¹ Green said, “[p]rior to the revolution wrought by the Bendectin litigation, expert

25 *Id.* at 396.

26 *Id.*

27 *Id.* (citation omitted).

28 See Michael D. Green, *The Road Less Well Traveled (and Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377 (1999).

29 *Id.* at 382-401.

30 *Id.* at 386 (noting one Bendectin case in 1990 in which a District of Columbia jury awarded an eight-year-old with arm and hand deformities \$20 million in compensatory and \$75 million in punitive damages, later overturned on appeal).

31 *Id.* at 388. As the U.S. Fifth Circuit Court of Appeals wrote in *Brock v. Merrell Dow Pharms.*, 874 F.2d 307, 309-10 (5th Cir. 1989):

Under the traditional approach to scientific evidence, courts would not peer beneath the reasoning of medical experts to question their reasoning.

testimony in products liability cases simply was not judicially screened.”³²

The highly contested issue eventually reached the Supreme Court of the United States, and the Court set the standard for admissibility of expert witness evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³³ The Supreme Court’s decision in *Daubert* set a rigorous standard of review and required judges to serve as “gatekeepers” in admitting expert scientific evidence in civil litigation. This requirement was expanded to include technical evidence and evidence requiring other specialized knowledge in *Kumho Tire Co. v. Carmichael*,³⁴ thus extending the “gatekeeper” role to all products liability cases. Green explained the impact of this new standard:

Suffice to say that *Daubert* made a sea change in the law of expert witnesses, and this new law has had a profound impact on products liability law. Expert witnesses testifying about alternative designs, the causes of accidents, the adequacy of warnings, and the existence of defects, have been subjected to the ‘gatekeeping’ mandated by *Daubert*, with their opinions frequently found inadmissible.³⁵

These examples show that it is possible for defense counsel to affirmatively request and win changes in the common law that benefit their clients – or, at the very least, persuade plaintiffs to lower their settlement demands.

III. What Are Areas Where “Tort Reform In The Courts” Is Needed?

Here are some examples of rules of tort law that have become outdated, making tort reform in the courts a sensible goal for defense counsel to pursue. The purpose of each change is to provide for a more fully informed jury. These are discussed thoroughly in our article, *Moving Toward the Fully Informed Jury*.³⁶

A. The Collateral Source Rule

The collateral source rule arbitrarily prevents a jury from knowing that a plaintiff has already received compensation for his or her injuries. This rule was developed

Confronted as we now are, with difficult medical questions, courts must critically evaluate the reasoning process by which the experts connect data to their conclusions in order for courts to consistently and rationally resolve the disputes before them.

32 *Id.* at 399.

33 509 U.S. 579 (1993).

34 526 U.S. 137 (1999).

35 Green, *supra* note 26, at 399.

36 Hantler, *supra* note 8.

more than 150 years ago.³⁷ Its predicates were a lack of trust in juries and a belief that a wrongdoer should not benefit from the fact that a plaintiff had already secured a resource for payment.³⁸ Today, most collateral sources are not monetary resources that the plaintiff has achieved through his or her own efforts. Rather, they are payments from government or other sources that have nothing to do with efforts by a plaintiff. Also, the fact that a defendant is allegedly a “wrongdoer” should not preclude a jury from deciding whether the defendant’s wrongdoing is so severe that the plaintiff deserves a double payment. In some situations, the theory of liability is not based on fault, but on “strict liability” for a product defect. The original rationale for the collateral source rule may be wholly inappropriate in that context.³⁹

B. The Seatbelt Evidence Rule

A second area where juries have been blindfolded and have not known about relevant evidence where a plaintiff did not wear a seatbelt at the time of an accident.⁴⁰ If a plaintiff has been careless in other respects, the jury would know about it. Jurors would want to know about seatbelt use in deciding the amount of damages to award a plaintiff, especially if it could be shown that the plaintiff would not have been injured if he or she wore a seatbelt or if his or her injuries would have been less severe. This rule that blinds a jury was formed a long time ago, before there were mandatory seatbelt laws, and before we really knew that seatbelts worked.⁴¹ It was at a time when few people “buckled up.” Now, almost everyone does so. It is time for the rule to change.

C. The DUI Evidence Rule

A third area where a jury is blindfolded is even more remarkable. In many jurisdictions, in automobile product liability cases, the jury is not told that a driver was under the influence of alcohol or drugs or even was asleep at the wheel.⁴² This rule was instituted when contributory negligence was the law, and even the slightest fault on the part of the plaintiff barred his or her claim. Courts were reluctant to expand upon this harsh rule. But contributory negligence is not the law today in many jurisdictions. It has been replaced by comparative fault.⁴³ Under certain rules of comparative fault, a jury can make a determination regarding the importance of the driver’s wrongful behavior, and apportion damages awarded to him or her. It is appropriate for the jury to have all the

37 *The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854).

38 J. O’Connell & R. Henderson, *Tort Law, No-Fault and Beyond* 114 (1975).

39 See Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569 (1986).

40 See Hantler, *supra* note 8, at 32 (collecting cases and statutes).

41 See, e.g., *Jones v. Dague*, 166 S.E.2d 99 (S.C. 1969); *Miller v. Miller*, 160 S.E.2d 65 (N.C. 1968); *Truman v. Vargas*, 80 Cal. Rptr. 373 (Cal. Ct. App. 1969); *Lipscomb v. Diamiani*, 226 A.2d 914 (Del. Super. Ct. 1967).

42 See Hantler, *supra* note 8, at 37-40.

43 RESTATEMENT OF TORTS, THIRD: PRODUCTS LIABILITY, § 17(a) & cmt. a, Reporters’ Notes (1998).

facts when a plaintiff driver was intoxicated or under the influence of illegal substances.

D. The Joint And Several Liability Doctrine

A fourth and equally astonishing rule is that a jury is not told about the impact of joint and several liability. Joint and several liability poses “a trap for the uninformed jury.” When a jury finds a defendant 5 percent at fault, it believes that the defendant will pay 5 percent of the damages, not 100 percent.⁴⁴ Juries should be told about this rule. A number of state supreme courts, including, as we have shown, the very liberal Supreme Court of Hawaii, have ruled that juries should be informed about the effect of joint and several liability.⁴⁵ Obviously, if a jury is informed, it would be more cautious before making an award that indicates that the defendant is 10 percent or 5 percent at fault. It is time to remove the blindfold from the jury about the effect of joint and several liability.

E. Barring Causation Evidence In Asbestos Cases

Finally, in some jurisdictions, juries are not told that the plaintiffs have been exposed to asbestos from sources other than the defendant. A plaintiff might have worked for the actual defendant for one hour, or half an hour, and yet have worked years for another company where he or she was exposed to massive amounts of asbestos. Any individual juror or potential juror would want to know that fact. Jurors would want to know about this highly relevant information.

CONCLUSION

Defendants have the power to remove blindfolds from juries. Defendants can change existing law through appropriate requests at the pre-trial and trial stages, preserving the issue for consideration by the supreme courts of each state. Corporate counsel should suggest to outside counsel that they consider pursuing this avenue for reform. If outside counsel see opportunities for tort reform in a case, they should bring it to the attention of their client and mutually decide whether to pursue the opportunity. A concerted effort by business and outside counsel to pursue tort reform in the courts would, over the next decade, equal and may surpass legislative tort reform. Finally, there is an added bonus over legislative tort reform. The courts will not hold the new rule “unconstitutional” as they have done in too many situations of legislative tort

44 Julie K. Weaver, Comment, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 471 (1992).

45 See, e.g., *DeCelles v. State*, 795 P.2d 419, 421 (Mont. 1990) (“We think Montana juries can and should be trusted with the information about the consequences of their verdict.”); *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64 (Idaho 1987); *Kaeo v. Davis*, 719 P.2d 387, 395-96 (Haw. 1986). But see *Lacy v. CSX Transp., Inc.*, 520 S.E.2d 418, 429 (W. Va. 1999) (holding jurors do not have the same need to learn about the effects of joint liability as they do about contributory negligence); *Dranzo v. Winterhalter*, 577 A.2d 1349, 1356 (Pa. Super. Ct. 1990) (same), cert. denied, 585 A.2d 469 (Pa. 1991); *Brodsky v. Grinnell Haulers, Inc.*, 827 A.2d 1104, 1113 (N.J. Super. Ct. App. Div.) (same), cert. granted 840 A.2d 259 (N.J. 2003).

reform. The courts have made the rules themselves through the common law process and, if the truth be told, they like it that way -- whether the change helps plaintiffs or defendants.⁴⁶

46 See Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907 (2001).

Appendix:

Introduction To Model Materials

These model materials were prepared to assist counsel as they develop their own legal memoranda, jury instructions and other materials in a specific case or family of cases to advance tort reform in the courts. These materials incorporate case law from jurisdictions throughout the country and, as a result, they must be adapted to reflect the law of the actual jurisdiction in which counsel's case is pending. For example:

Counsel must check for binding legal authority from the courts and legislature in the jurisdiction before deciding whether to seek reform of a particular legal doctrine. In some states, courts and lawmakers may already have resolved the issue, making a particular motion either unnecessary or unwise. Of course, if binding case precedent is old and outdated, counsel may have a strong public policy argument that it is time for a change.

The law in counsel's specific jurisdiction must be researched to ensure it supports the legal arguments asserted. For example, the model legal memorandum on instructing the jury on the consequences of joint and several liability includes an argument analogizing to cases that either require or allow jury instructions on the consequences of comparative fault. In some states, though, courts have explicitly ruled that jurors are not to be instructed on the consequences of comparative fault. In such jurisdictions, the argument in the model materials should be modified. The model materials include sample alternative provisions for use in such instances.

Counsel should ensure that the factual allegations support the legal arguments and are set forth sufficiently in their court papers to satisfy legal requirements in their jurisdiction, particularly in seeking the admission of evidence where an offer of proof is required.

The model materials should be adapted to the type of pleading or document required by court rules and practice in a specific jurisdiction. For example, the model materials may address through a motion in limine an issue that, in counsel's specific jurisdiction, is more properly addressed in a pre-trial memorandum. The formatting for court documents (including page lengths), legal citations and the like also should conform to local rules.

Optional or alternative sample language and recommendations for citation of jurisdiction-specific law are indicated in the model materials in bracketed, bold italics. Use of these will depend on the law of the jurisdiction.

1. The Collateral Source Rule

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT

COUNTY, STATE

MARY ANN SMITH, individually,

Plaintiff,

v.

MOM & POP GROCERY STORE,

Defendant.

No. 04-L-0000

Judge Phillips

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION IN
LIMINE TO ADMIT EVIDENCE OF COLLATERAL SOURCE PAYMENTS**

Comes now Defendant Mom & Pop Grocery Store and presents its Memorandum of Law in support of its motion in limine to admit evidence of collateral source payments in this case. In support of its motion, Defendant states as follows:

I.

INTRODUCTION

Plaintiff is a fifty-year-old woman who alleges she injured her knee as a result of Defendant’s negligence when she slipped and fell on a broken jar of ketchup in the aisle of Defendant’s grocery store. Plaintiff alleges that Defendant was negligent because its employees failed to promptly pick up the jar, even though another customer dropped the jar just minutes before her fall. Plaintiff is claiming \$40,000 in medical expenses, \$80,000 in lost wages, and pain and suffering damages.

Defendant would show that eighty percent of Plaintiff’s medical expenses were covered by

her employer-provided health insurance. Defendant would also show that Plaintiff is collecting \$1,500 each month in Social Security disability payments as a result of the accident. Defendant believes that such evidence is relevant and material to the proper award of damages in this case, if indeed any liability exists. Defendant respectfully requests this Court to reject the application of the outdated “collateral source” doctrine and admit this evidence.

II.

THE COLLATERAL SOURCE RULE IS OUTDATED AND FAILS TO SERVE A LEGITIMATE PUBLIC POLICY PURPOSE

The collateral source rule keeps a jury from knowing that a plaintiff has already received partial or even full compensation for the actual monetary loss for his injuries. The application of this rule forces a tortfeasor to pay for all of the harms caused by the tort without regard to the actual net loss resulting to the injured party.

The collateral source rule is more than 150 years old. See The Propeller Monticello v. Mol-lison, 58 U.S. 152 (1854) (constituting the first American application of the collateral source rule). The rule is contrary to the fundamental principle that the purpose of tort law is to make a person whole, not “more than whole.” Its predicate was a lack of trust in jurors and the belief that jurors may find no liability if they know the plaintiff was compensated for his injury by other sources. See Eichel v. N.Y. Cent. R.R., 375 U.S. 253, 255 (1963) (in case brought under the Federal Employers’ Liability Act, stating that the likelihood of juror misuse of evidence of collateral sources outweighs the value of admitting such evidence). The rule also is grounded in a belief 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.” J. O’Connell & R. Henderson, Tort Law, No-Fault and Beyond 114 (1975); see also Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970) (stating that the rule “embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim’s

providence.”).

The collateral source rule’s underlying assumption that every plaintiff’s benefits come from his own prudence is often not applicable today, and specifically is not applicable here. “In terms of fundamentals, when courts remove the basis of a rule, the rule itself should be abandoned.” Victor E. Schwartz, Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix, 39 Vand. L. Rev. 569, 573 (1986). The rule came into being before the New Deal of the 1930s ushered in a new era of public benefits, trust funds and employer-sponsored health plans. See, e.g., Deborah Van Meter, Louisiana’s Collateral Source Rule: Time for a Change?, 32 Loy. L. Rev. 978, 982 (1987) (noting that “[s]ources such as employee benefits and insurance plans were practically nonexistent in the mid-nineteenth century when the collateral source rule first appeared.”).

Payments from these sources are not the result of any foresight on the part of the plaintiff, but result from government-mandated programs or other programs that are often at least partially, if not predominantly, funded by the same party defending the lawsuit. Though times and facts have changed, some courts have adhered rigorously to precedent and outdated reasoning. See, e.g., Williston v. Ard, 611 So. 2d 274, 277 (Ala. 1992) (refusing to admit evidence of available public school education opportunities in case where jury was asked to assess lifetime damages for a child who sustained brain damage prior to birth). The better approach is the one taken by the Florida Supreme Court in Florida Physician’s Ins. Reciprocal v. Stanley, 452 So. 2d 514, 515-16 (Fla. 1984).

[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 plaintiff 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.

Here, the majority of Plaintiff’s medical expenses and lost wages are covered by employer-

provided health insurance and Social Security benefits. These are not sources that Plaintiff procured on her own.

The collateral source rule also fails to take into account the significant changes in tort law in the 20th century. Since the 1960s, courts have moved more towards compensation for actual harm only, abolishing a number of traditional defenses and spreading the risk with less emphasis on fault. See Ernest B. Lageson, Collateral Source—An Outmoded Rule, For the Def., Oct. 1986, at 1. For example, strict products liability law, which first developed in the early 1960s, see Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1963) (Traynor, J.), means that defendants who are not “at fault” still can be found liable for a plaintiff’s injuries. Justice Traynor and other judges who followed his adoption of the doctrine justified strict liability on the basis of “risk distribution,” in other words, “the manufacturers and distributors of defective products can best allocate the costs of the injuries resulting from those products. In this way, the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale and the buyers who profit from its use.” Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 547 (N.J. 1982). But, as one tort law scholar wrote:

It should be clear to the reader that by justifying strict liability in terms of risk distribution the courts have surgically removed from strict liability the very basis on which the collateral source rule is premised. . . . Sound economics also demands the abolition of the collateral source rule when a defendant has been found strictly liable. Given that risk distribution is the nub of strict liability, it is foolish to distribute a risk for which the victim already has been compensated. When the tort system distributes a previously compensated-for risk, it, in effect, redistributes the risk to a different insurance system. This redistribution makes poor economic sense.

Schwartz, supra, at 573.

Even though the underlying rationale for the collateral source rule has been cut away in these cases, courts still have applied the rule. As for those defendants who are at fault, their misconduct can fall into many categories, from negligence at one end of the scale to intentional misconduct at the other end. The major change in the law in most states from contributory to

comparative negligence has recognized that fact. The abolition of a rule that there should be no contribution between joint tortfeasors has also recognized that fault is not a static concept, but a continuum of responsibility. Modern jurors can and should decide whether a defendant's fault-based conduct is so severe that it merits a double payment to a plaintiff. See Steven B. Hantler et al., Moving Toward the Fully Informed Jury, 3 Geo. J.L. & Pub. Pol'y 21, 22-23, 30-31 & n.2 (2005) (discussing strengths of juror decision making and efforts to advocate a more active and informed role for juries).

Application of the collateral source rule in these days where multi-million and -billion dollar verdicts are a regular occurrence needlessly creates strong incentives to sue, even if a person has already received or is receiving substantial compensation. Unnecessary litigation and its attendant transactional costs, such as attorneys' fees and court expenses, increase insurance premiums and needlessly use judicial resources. Awards in such cases serve little or no compensatory purpose. When the collateral source rule permits double compensation, the main result is an arbitrary punishment of some defendants whose conduct may not justify the defendant paying a plaintiff who has already been compensated. See Hubbard Broad., Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980). Some have justified allowing plaintiffs to recover for damages not suffered as a way of imposing punitive damages in cases where they are not otherwise available. But under this approach, the collateral source rule treats negligent or slightly negligent defendants the same way as defendants that have acted intentionally. It also presumes, inaccurately, that the collateral source rule can deter negligent conduct. See American Standard Ins. Co. v. Cleveland, 369 N.W.2d 168, 172 (Wis. 1985). Negligent conduct, by definition, occurs without conscious disregard on the part of the wrongdoer.

The collateral source rule continues in many contexts today, but its public policy weaknesses have caused a number of state legislatures and courts to reduce its reach or eliminate it altogether. See Prosser, Wade & Schwartz's Torts (11th ed. 2005) (noting that over half of the states have modified the collateral source rule by statute). A better approach for courts to adopt 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. The result: damages awards that more fairly compensate an injured person for actual loss, and jury authority to decide whether double compensation is justified in the context of a specific case.

“The adaptability of the common law to the changing needs of passing time has been one of its most beneficent characteristics.” Johnston v. KFC Nat’l Mgt. Co., 788 P.2d 159, 162 (Haw. 1990) (quoting with approval Ely v. Murphy, 540 A.2d 54, 57 (Conn. 1988)). The reasons for the collateral source rule no longer apply in the 21st Century. This Court should recognize this fact and allow jurors to be informed about what they would wish to know – how much the plaintiff has already received in compensation for his or her harm.

CONCLUSION

WHEREFORE FOR ALL OF THE ABOVE REASONS, Defendant respectfully submits this Memorandum of Law in Support of its motion in limine seeking admission of evidence of Plaintiff’s collateral source payments.

**MODEL JURY INSTRUCTIONS
COLLATERAL SOURCE RULE**

COLLATERAL SOURCE RULE

If you have found that *[defendant]* is liable to pay compensatory damages to the plaintiff under the instructions that I have just given you, then you should subtract from the total amount of compensatory damages the amount of monies or benefits received from third parties by plaintiff as a result of *[his] [her]* injury.¹

¹ See Washington v. Barnes Hosp., 897 S.W.2d 611 (Mo. 1995); Florida Phys. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984); Peterson v. Lou Bachrodt Chevrolet Co., 392 N.E.2d 1 (Ill. 1979); Coyne v. Campbell, 183 N.E.2d 891 (N.Y. 1962).

2. The Seatbelt Evidence Rule

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT COUNTY, STATE

ROBERT J. SMITH, individually,

Plaintiff,

v.

AUTOMAKER CORP., *et al.*,

Defendants.

No. 04-L-0000

Judge Phillips

DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION IN LIMINE TO ADMIT EVIDENCE OF PLAINTIFF’S FAILURE TO USE A SEATBELT

Comes now Defendant Automaker Corp. and presents its Memorandum of Law in support of its motion in limine to admit evidence of Plaintiff’s failure to use an available seatbelt. In support of its motion, Defendant states as follows:

I.

BACKGROUND

Plaintiff is a thirty-year-old man who alleges defective design and other products liability-related claims against Defendant for injuries he incurred as an automobile passenger in a motor vehicle accident.

Defendant would show that Plaintiff negligently failed to use an available seatbelt and that some or all of his injuries were the result of Plaintiff’s failure to do so. Defendant believes that such evidence is relevant and material to the determination of liability and the proper award of damages in this case, if indeed any liability exists. Defendant respectfully requests this Court to reject the application of the outdated “seatbelt evidence” doctrine and admit this evidence.

II.

THE SEATBELT EVIDENCE RULE IS OUTDATED AND FAILS TO SERVE A LEGITIMATE
PUBLIC POLICY PURPOSE

The seatbelt evidence rule keeps a jury from hearing evidence that a plaintiff in a motor vehicle accident failed to use an available seatbelt and that all or part of his injuries resulted from his failure to do so. Under the law of this state, the seatbelt evidence rule prevents a jury from considering seatbelt evidence *[in determining the extent of the plaintiff's fault] [in assessing damages] [in determining both the extent of the plaintiff's fault and the appropriate amount of damages]. [Cite jurisdiction-specific case law.]* Applying this rule can create the opportunity for a faultless product manufacturer to be held liable under strict product liability principles for injuries that easily could have been avoided or minimized by the negligent plaintiff.

A. Seatbelts Can Easily And Effectively Prevent Or Reduce Injuries.

Seatbelts reduce injuries and save lives in motor vehicle accidents. According to the National Highway Traffic Safety Administration (NHTSA), safety belts reduce death and serious injury of front seat occupants by 50 percent. See Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., May 2003 Click it or Ticket Safety Belt Mobilization Evaluation Final Report (Nov. 2003), at <http://www.nhtsa.dot.gov/people/injury/airbags/seatbelts.htm> (last visited Sept. 22, 2005) (hereinafter "Click It or Ticket"). Indeed, NHTSA reported that seatbelts saved an estimated 14,000 motorists in 2002 and save "billions of dollars in costs to society annually" by "saving lives and preventing injuries." Id. NHTSA reported in 2004 that although only 20 percent of all drivers and passengers do not wear their seatbelts, these non-seatbelt wearers disproportionately make up 56 percent of those killed in automobile accidents. See Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., Chart: Safety Belt Use, <http://www.buckleupamerica.org> (last visited Oct. 21, 2005); News Release, Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., Highway Fatalities an Epidemic – Nation Should Prevent Traffic Deaths Like Any Other Disease (Apr. 21, 2005), <http://www.buckleupamerica.org>.

No safety device can be fully counted on to save people who refuse to wear seatbelts; “[w]earing a seat belt is the single most important thing you can do to save your life.” Fed. Motor Carrier Safety Admin., U.S. Dep’t of Transp., Share the Road Safely: Safety Tips for Car Drivers, http://www.nozone.org/cardrivers/carSafety_Tips.asp (last visited Sept. 22, 2005). Other safety devices are not nearly as effective. For example, according to NHTSA, “[a]ir bags are designed to be used with seat belts. By themselves, they are only 12% effective at reducing deaths.” Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., How Wearing Seatbelts can Help You Save Time, Money, and...Your Life, DOT HS 809 453, <http://www.nhtsa.dot.gov/people/injury/airbags/seatbelts.htm> (last visited Sept. 22, 2005) (emphasis in original).

B. The Seatbelt Evidence Rule Is Based On Old, Unfounded Concerns About Safety And Effectiveness.

The rule against admitting seatbelt evidence reflects past and outdated public concerns about the effectiveness and potential dangers of seatbelt use. Opinions forbidding the jury from considering evidence of a plaintiff’s failure to wear a seatbelt are from an era where car safety was quickly evolving and seatbelts were relatively new. In short, they are no longer applicable in the year 2005. One court of that time noted that its decision stood on public consensus – a consensus that in 2005 has long evolved – and explained that: “[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.” Miller v. Miller, 160 S.E.2d 65, 69 (N.C. 1968) *[(also noting that the use of seatbelt evidence to mitigate damages is barred by the same considerations that bar its use on liability issues)]*. Another court explained that seatbelts were “a relatively new safety devise” not available in all cars, and ruled that juror consideration of seatbelt use therefore would be speculative and “void of standards” and would “degrade the law by reducing it to a game of chance.” Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. 1967) *[(rejecting use of seatbelt evidence for purposes of both liability and damages considerations)]*. See also Hampton v. State Highway Comm’n, 498 P.2d 236, 248-49 (Kan. 1972) (citing the public’s fears about wearing seatbelts *[and finding “there was no duty to use a seat belt, either under the common law standard of due care or to mitigate dam-*

ages”); McCord v. Green, 362 A.2d 720, 722-25 (D.C. App. 1976) (questioning the effectiveness and safety of seatbelts *[and rejecting use of seatbelt evidence for purposes of both liability and damages considerations]*).

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.” Michelle R. Mangrum, The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?, 50 Mo. L. Rev. 969, 978 (1985). Today most cars contain seatbelts for all passengers and the federal and state governments and the general public recognize that seatbelts are an effective safety device. See e.g., Click it or Ticket Final Report, *supra* (reporting that 79% of Americans buckle up and 87% of Americans when surveyed reported they buckled up “all the time”); Buckle Up America Website, *supra*; *[cite jurisdiction-specific statute requiring use of seatbelts in passenger vehicles.]* 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 comes to the minds of jurors deliberating an automobile accident case as well.

C. The Seatbelt Evidence Rule Reflects An Outdated Rule Of Law.

The seatbelt evidence rule also is a remnant of the climate created by decades-old decisions on contributory negligence. 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. Miller, 160 S.E.2d at 73. 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. See *id.*; Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867, 869-71 (W.D. Pa. 1975) (citing the severe effects of contributory negligence as reason for not admitting seatbelt evidence).

Today, however, principles of comparative fault are followed in *[this and most other]*

jurisdictions across America and relieve the harsh results of contributory negligence. *See [insert jurisdiction-specific case cite]*; Victor E. Schwartz, *Comparative Negligence* (4th ed. 2002). The comparative fault doctrine allows jurors the freedom to determine a plaintiff is partially at fault without depriving the plaintiff of all recovery, if the jurors determine this is just. These developments in legal principles and public safety alleviate the need for courts to contrive ways to hide from the jury facts that may help them assess liability. In light of this important change in legal doctrine, *[including this state's adoption of comparative fault principles]*, this Court should not apply legal decisions barring seat belt evidence that were rendered at a time the all-or-nothing contributory negligence rule applied.

A Colorado Supreme Court decision, *Fischer v. Moore*, illustrates the impact of the contributory negligence system on a court's decision whether to allow the jury to hear evidence of the plaintiff's failure to use a seatbelt. 517 P.2d 458 (Colo. 1974) (en banc). *Fischer* involved an automobile accident that occurred before the Colorado legislature enacted its comparative negligence statute. *Id.* at 458. 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.

Id. at 458-59 (emphasis added).

Given the demonstrated fact that seatbelts have been demonstrated to 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. “The adaptability of the common

law to the changing needs of passing time has been one of its most beneficent characteristics.” Johnston v. KFC Nat’l Mgt. Co., 788 P.2d 159, 162 (Haw. 1990) (quoting with approval Ely v. Murphy, 540 A.2d 54, 57 (Conn.1988)). The reasons for the seatbelt evidence rule have been proven groundless and no longer apply in the 21st Century. This Court should recognize this fact and allow jurors to be informed about what they would wish to know – whether the plaintiff was wearing a seatbelt at the time of the accident and, if not, whether his failure to do so caused or contributed to his injuries.

III.

CONCLUSION

WHEREFORE FOR ALL OF THE ABOVE REASONS, Defendant respectfully submits this Memorandum of Law in Support of its motion in limine seeking admission of evidence of Plaintiff’s failure to wear an available seatbelt and evidence that his failure to do so caused or contributed to his injuries.

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

COMPARATIVE FAULT – PURE

The defendant claims that some or all of the plaintiff's claimed injuries were caused by *[his]/[her]* failure to use an available seat belt and that plaintiff cannot recover for those injuries.

The defendant has the burden of proving that a reasonably prudent person would have used an available seat belt and that some or all of the plaintiff's injuries were caused by *[his]/[her]* failure to use an available seatbelt.

If you find that a reasonably prudent person would have used an available seat belt and that some or all of the plaintiff's injuries resulted from *[his]/[her]* failure to use an available seat belt, you must then apportion the fault between the plaintiff and defendant.¹

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff's injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.

You will be given a verdict sheet containing several questions. The first question asks whether the defendant was negligent. The second question asks the defendant's negligence (if any) was a substantial factor in causing the plaintiff's injury or damage. The third question asks whether the plaintiff was negligent. The fourth question asks whether the plaintiff's negligence (if any) was a substantial factor in causing the plaintiff's injury or damage. The fifth question asks you to determine the percentage of fault of the defendant and of the plaintiff, which must total 100%.

¹ *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

COMPARATIVE FAULT—MODIFIED

The defendant claims that some or all of the plaintiff's claimed injuries were caused by *[his/her]* failure to use an available seat belt and that plaintiff cannot recover for those injuries.

The defendant has the burden of proving that a reasonably prudent person would have used an available seat belt and that some or all of the plaintiff's injuries were caused by *[his/her]* failure to use an available seatbelt.

If you find that a reasonably prudent person would have used an available seat belt and that some or all of the plaintiff's injuries resulted from *[his/her]* failure to use an available seat belt, you must then apportion the fault between the plaintiff and defendant.

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff's injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.

If the negligence of plaintiff is of less degree than the negligence of defendant, then plaintiff is entitled to recover any damages which you find he has sustained as a result of the occurrence, reduced, however, by the percentage of plaintiff's own negligence as compared with that of the defendant.

On the other hand, if you find that the negligence of plaintiff was equal to or greater in degree than the negligence of defendant, then plaintiff is not entitled to recover any damages, and your verdict must be in favor of the defendant.²

2 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

COMPARATIVE FAULT—EQUALLY NEGLIGENT PLAINTIFF

The defendant claims that some or all of the plaintiff's claimed injuries were caused by *[his/her]* failure to use an available seat belt and that plaintiff cannot recover for those injuries.

The defendant has the burden of proving that a reasonably prudent person would have used an available seat belt and that some or all of the plaintiff's injuries were caused by *[his/her]* failure to use an available seatbelt.

If you find that a reasonably prudent person would have used an available seat belt and that some or all of the plaintiff's injuries resulted from *[his/her]* failure to use an available seat belt, you must then apportion the fault between the plaintiff and defendant.

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff's injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.

If the negligence of plaintiff is less than or equal to the negligence of defendant, then plaintiff is entitled to recover any damages which you may find he has sustained as a result of the occurrence after you have reduced his damages in proportion to the degree of plaintiff's own negligence.

On the other hand, if defendant was not negligent or if the negligence of defendant was less than the negligence of the plaintiff, then plaintiff is not entitled to recover any damages.³

3 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

COMPARATIVE FAULT – STATUTORY DUTY

[Section __ of the state’s applicable statute] provides [in part] that no person shall be a passenger in a private motor vehicle unless that person is restrained by a safety belt. A driver of a motor vehicle is a passenger within the meaning of this statute.⁴

If you find that a seat belt was available to plaintiff and that plaintiff violated *[Section __ of the state’s applicable statute]*, you must find that the plaintiff was negligent under the legal doctrine of negligence per se.⁵

[ALTERNATIVE]

[If you find that a seat belt was available to plaintiff and that plaintiff violated [Section __ of the state’s applicable statute], you may consider those facts in determining whether plaintiff exercised ordinary care under the circumstances. Evidence of whether a party conformed to the seat belt law is relevant to that issue and ought to be considered, but is not necessarily controlling.⁶]

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff’s injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.

You will be given a verdict sheet containing several questions. The first question asks whether the defendant was negligent. The second question asks the defendant’s negligence (if any) was a substantial factor in causing the plaintiff’s injury or damage. The third question asks whether the plaintiff was negligent. The fourth question asks whether the plaintiff’s negligence (if any) was a substantial factor in causing the plaintiff’s injury or damage. The fifth question asks you to determine the percentage of fault of the defendant and of the plaintiff, which must total 100%.

4 *[insert jurisdiction-specific case law]*

5 *[insert jurisdiction-specific case law]*

6 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

COMPARATIVE FAULT – JUROR INTERROGATORIES

1. Was the defendant negligent?

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer is “No,” proceed no further and report to the court. If your answer is “Yes,” proceed to Question “2.”

2. Was defendant’s negligence a *[substantial]* factor in causing the plaintiff’s injury or damage?⁷

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer is “No,” proceed no further and report to the court. If your answer to Question “2” is “Yes,” proceed to Question “3.”

3. Was plaintiff negligent?

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer to Question “3” is “No,” proceed no further and report to the court. If your answer to Question “3” is “Yes,” proceed to Question “4.”

4. Was plaintiff’s negligence a *[substantial]* factor in causing the plaintiff’s injury or damages?⁸

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer to Question “4” is “No,” proceed no further and report to the court. If your answer to Question “4” is “Yes,” proceed to Question “5.”

7 *[insert jurisdiction-specific case law]*

8 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

COMPARATIVE FAULT – JUROR INTERROGATORIES (CONT.)

5. What was the percentage of fault of the defendant and what was the percentage of fault of the plaintiff?

At least *[required number of]* jurors must agree on the answer to this question.

Defendant _____%

Plaintiff _____%

Total must be 100%

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

MITIGATION OF DAMAGES

You have been instructed that plaintiff has a duty to take reasonable steps to mitigate or minimize *[his/her]* injury or damages. If you find that a reasonably prudent person in the plaintiff's position would have used an available seat belt and that some or all of the plaintiff's injuries resulted from *[his/her]* failure to use an available seat belt, you may not make any award for those injuries you find *[he/she]* sustained because of such failure to use the seatbelt.⁹

You will be given a verdict sheet containing several questions. The first question asks that you insert the total damages sustained by the plaintiff, that is, the total of all damages, both past and future, which you have itemized. The second question asks whether a reasonably prudent person in the plaintiff's position would have used a seatbelt. The third question asks whether defendant has proved that some or all of plaintiff's injuries were caused by the failure to use an available seatbelt. If you have answered "Yes" to the third question, you will answer the fourth question that asks you to compute the amount of money by which the plaintiff's damages should be reduced because of the plaintiff's failure to use an available seatbelt.

⁹ *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
SEATBELT EVIDENCE**

**SEATBELT EVIDENCE – MITIGATION OF DAMAGES
JUROR INTERROGATORIES**

If your verdict is in favor of the plaintiff, answer the following:

1. What are the total damages sustained by the plaintiff?

At least *[required number of]* jurors must agree on the answer to this question.

\$ _____

2. Would a reasonably prudent passenger in plaintiff's position have used an available seatbelt?

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

Do not answer Question "3" unless your answer to Question "2" is "Yes."

3. Were any of the plaintiff's injuries caused by *[his]/[her]* failure to use an available seat belt?

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

Do not answer Question "4" unless your answer to Question "3" is "Yes."

4. By what amount should plaintiff's total damages be reduced because of *[his]/[her]* failure to use an available seat belt.

At least *[required number of]* jurors must agree on the answer to this question.

\$ _____

3. The DUI Evidence Rule

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT COUNTY, STATE

ROBERT J. SMITH, individually,

Plaintiff,

v.

AUTOMAKER CORP., *et al.*,

Defendants.

No. 04-L-0000

Judge Phillips

DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION IN LIMINE TO ADMIT EVIDENCE OF PLAINTIFF’S INTOXICATION

Comes now Defendant Automaker Corp. and presents its Memorandum of Law in support of its motion in limine to admit evidence of Plaintiff’s intoxication. In support of its motion, Defendant states as follows:

I.

BACKGROUND

Plaintiff is a thirty-year-old man who alleges defective design and other products liability-related claims against Defendant for injuries he incurred in a motor vehicle accident.

Defendant would show that when the accident occurred, Plaintiff was negligently driving while intoxicated and that this was the proximate cause of *[the accident] [and] [some or all of his injuries]*. Defendant believes that such evidence is relevant and material to the determination of liability and the proper award of damages in this case, if indeed any liability exists. Defendant respectfully requests this Court to reject the application of the outdated rule against evidence of the driver’s intoxication and admit this evidence.

II.

THE RULE AGAINST USE OF EVIDENCE OF A DRIVER'S INTOXICATION IN A PRODUCTS LIABILITY CASE IS OUTDATED AND FAILS TO SERVE A LEGITIMATE PUBLIC POLICY PURPOSE

The rule keeps a jury from hearing evidence that a plaintiff in a motor vehicle accident was driving while intoxicated and that all or part of his injuries resulted from his negligence in doing so. Under the law of this state, the rule prevents a jury from considering intoxication evidence *[in determining the extent of the plaintiff's fault] [in assessing damages] [in determining both the extent of the plaintiff's fault and the appropriate amount of damages]. [Cite jurisdiction-specific case law.]* When jurors are not informed of a driver's impairment that may have contributed to *[a vehicle accident] [and the resulting alleged injury] [a claimed injury]*, they are missing key information they might find helpful in allocating responsibility. Applying this rule can create the opportunity for a faultless product manufacturer to be held liable under strict product liability principles for injuries that easily could have been avoided or minimized by the negligent plaintiff.

The rule barring such intoxication evidence is outdated. It developed as a result of the introduction of strict product liability principles in the 1960s. Under the old formulation of strict products liability, most courts treated contributory negligence as a total bar to the plaintiff's recovery. Out of concern that a plaintiff who was just slightly negligent would be barred from recovering any damages, jurors were not permitted to consider evidence of plaintiff negligence. See Restatement (Second) of Torts § 402A cmt. n (1965) ("Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."); Restatement of Torts, Third: Products Liability § 17 cmt. a (1998) (explaining the reluctance to bar a plaintiff's products liability claim in tort based on conduct that "was not egregious" due to the all-or-nothing effects of contributory negligence) *[insert jurisdiction-specific case cites from 1960s here]*.

Under the old rule of strict products liability, the following two plaintiffs would recover the

same award if they received identical injuries from a head-on collision: A person who was driving responsibly but whose brakes failed, and a person who was heavily intoxicated or under the influence of illegal drugs at the time of the accident but alleged the car brakes failed. Courts have struggled with the fairness of this rule. As one court noted:

[I]t ... does not seem fair to allow a negligent plaintiff, who may have contributed as much as fifty percent of his injuries, to pay for none of them and to recover as much as a plaintiff who had taken all precautions reasonable under the circumstances.

Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1568 (D. Vt. 1985).

The old rules of strict liability and contributory negligence have changed in the past forty years. Restatement of the Law, Third, Torts: Products Liability § 17 cmt. a (1998). Now, under modern comparative fault principles followed *[in this state]* and most other jurisdictions nationwide, plaintiffs are allowed to recover to some degree, even if a jury finds them partially at fault *[cite jurisdiction-specific case law and/or statute.]* Most jurisdictions, *[including this one,]* now allow juries to hear evidence of other kinds of plaintiff negligence in a products liability case. See e.g., id., § 17 Reporters' Note, cmt. a *[cite jurisdiction-specific case law allowing other types of plaintiff negligence in products liability actions].*

These courts provide several reasons for their rulings. *[cite jurisdiction-specific examples here.]* One reason is the unfairness of rewarding a negligent plaintiff with the same amount of damages as a plaintiff who took all precautions. Goodyear Tire, 600 F. Supp. at 1568. Another is the economic inefficiency of not allowing the jury to consider evidence of the plaintiff's fault. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 425 (Tex. 1984) ("The failure to allocate costs in proportion to the parties' relative abilities to prevent or reduce those costs is economically inefficient. ...[E]quitable and rational risk distribution, a fundamental policy underlying the imposition of strict products liability, logically depends on the existence of some system for comparing causation in cases involving plaintiff or third party misconduct."). Courts also reason that allowing evidence of plaintiff negligence keeps plaintiffs accountable for their actions. Goodyear Tire, 600

F. Supp. at 1568 (“it is unwise to relieve users and consumers of all responsibility for safe product use and consumption”). These courts properly recognize that excluding evidence relevant to establishing the facts of the case “denie[s] the jury the opportunity to fairly judge” the case at hand. See generally Swagian v. General Motors Corp., 916 F.2d 31, 34-35 (1st Cir. 1990) (holding that failure to admit evidence of the “dramatic” intoxication of the plaintiff and his deceased spouse constituted clear error requiring a new trial).

This Court should admit evidence that Plaintiff was intoxicated at the time of the accident and that his intoxication caused or contributed to his injuries. The reasons for the rule against admitting evidence of a plaintiff’s intoxication no longer apply in the 21st Century. “The adaptability of the common law to the changing needs of passing time has been one of its most beneficent characteristics.” Johnston v. KFC Nat’l Mgt. Co., 788 P.2d 159, 162 (Haw. 1990) (quoting with approval Ely v. Murphy, 540 A.2d 54, 57 (Conn.1988)). The jury should be able to make its decision in this case with full awareness of these facts.

III.

CONCLUSION

WHEREFORE FOR ALL OF THE ABOVE REASONS, Defendant respectfully submits this Memorandum of Law in Support of its motion in limine seeking admission of evidence that Plaintiff was driving while intoxicated at the time of the accident and that his negligence in doing so caused or contributed to his injuries.

**MODEL JURY INSTRUCTIONS
DUI EVIDENCE**

DRIVING UNDER THE INFLUENCE

A person is [*under the influence of any alcoholic beverage*] [*under the combined influence of any alcoholic beverage and any drug*] [*under the influence of any drug*] when as a result of [*drinking an alcoholic beverage*] [*and*] [*using any drug*] [*his*] [*or*] [*her*] physical or mental abilities are impaired so that the person is not able to drive a vehicle in the manner that a sober person of ordinary prudence would drive under the same or similar circumstances.¹

¹ [*cite jurisdiction-specific case law*]

**MODEL JURY INSTRUCTIONS
DUI EVIDENCE**

COMPARATIVE FAULT – STATUTORY DUTY

[Section __ of the state’s applicable statute] provides *[in part]* that: “It is unlawful for any person who is *[under the influence of any alcoholic beverage,] [under the combined influence of any alcoholic beverage and any drug,] [under the influence of any drug,]* to drive a vehicle.”²

If you find that plaintiff violated *[Section __ of the state’s applicable statute]*, you must find that the plaintiff was negligent under the legal doctrine of negligence per se.³

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff’s injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.

You will be given a verdict sheet containing several questions. The first question asks whether the defendant was negligent. The second question asks the defendant’s negligence (if any) was a substantial factor in causing the plaintiff’s injury or damage. The third question asks whether the plaintiff was negligent. The fourth question asks whether the plaintiff’s negligence (if any) was a substantial factor in causing the plaintiff’s injury or damage. The fifth question asks you to determine the percentage of fault of the defendant and of the plaintiff, which must total 100%.

2 *[cite jurisdiction-specific case law]*

3 *[cite jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
DUI EVIDENCE**

COMPARATIVE FAULT – PURE

The defendant claims that some or all of the plaintiff's claimed injuries were caused because plaintiff was driving while under the influence of alcohol and that plaintiff cannot recover for those injuries.

The defendant has the burden of proving that the plaintiff was driving under the influence of alcohol and that some or all of the plaintiff's injuries were caused because the plaintiff was driving under the influence of alcohol.

If you find that the plaintiff was driving under the influence of alcohol and that some or all of the plaintiff's injuries resulted because the plaintiff was driving under the influence of alcohol, you must then apportion the fault between the plaintiff and defendant.

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff's injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.⁴

You will be given a verdict sheet containing several questions. The first question asks whether the defendant was negligent. The second question asks the defendant's negligence (if any) was a substantial factor in causing the plaintiff's injury or damage. The third question asks whether the plaintiff was negligent. The fourth question asks whether the plaintiff's negligence (if any) was a substantial factor in causing the plaintiff's injury or damage. The fifth question asks you to determine the percentage of fault of the defendant and of the plaintiff, which must total 100%.

4 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
DUI EVIDENCE**

COMPARATIVE FAULT—MODIFIED

The defendant claims that some or all of the plaintiff's claimed injuries were caused because plaintiff was driving while under the influence of alcohol and that plaintiff cannot recover for those injuries.

The defendant has the burden of proving that the plaintiff was driving under the influence of alcohol and that some or all of the plaintiff's injuries were caused because the plaintiff was driving under the influence of alcohol.

If you find that the plaintiff was driving under the influence of alcohol and that some or all of the plaintiff's injuries resulted because the plaintiff was driving under the influence of alcohol, you must then apportion the fault between the plaintiff and defendant.

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff's injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.

If the negligence of plaintiff is of less degree than the negligence of defendant, then plaintiff is entitled to recover any damages which you find he has sustained as a result of the occurrence, reduced, however, by the percentage of plaintiff's own negligence as compared with that of the defendant.

On the other hand, if you find that the negligence of plaintiff was equal to or greater in degree than the negligence of defendant, then plaintiff is not entitled to recover any damages, and your verdict must be in favor of the defendant.⁵

5 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
DUI EVIDENCE**

COMPARATIVE FAULT—EQUALLY NEGLIGENT PLAINTIFF

The defendant claims that some or all of the plaintiff's claimed injuries were caused because plaintiff was driving while under the influence of alcohol and that plaintiff cannot recover for those injuries.

The defendant has the burden of proving that the plaintiff was driving under the influence of alcohol and that some or all of the plaintiff's injuries were caused because the plaintiff was driving under the influence of alcohol.

If you find that the plaintiff was driving under the influence of alcohol and that some or all of the plaintiff's injuries resulted because the plaintiff was driving under the influence of alcohol, you must then apportion the fault between the plaintiff and defendant.

Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both the plaintiff and defendant which contributed to causing the plaintiff's injury or damage and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal 100%.

If the negligence of plaintiff is less than or equal to the negligence of defendant, then plaintiff is entitled to recover any damages which you may find he has sustained as a result of the occurrence after you have reduced his damages in proportion to the degree of plaintiff's own negligence.

On the other hand, if defendant was not negligent or if the negligence of defendant was less than the negligence of the plaintiff, then plaintiff is not entitled to recover any damages.⁶

6 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
DUI EVIDENCE**

COMPARATIVE FAULT – JUROR INTERROGATORIES

1. Was the defendant negligent?

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer is “No,” proceed no further and report to the court. If your answer is “Yes,” proceed to Question “2.”

2. Was defendant’s negligence a *[substantial]* factor in causing the plaintiff’s injury or damage?⁷

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer is “No,” proceed no further and report to the court. If your answer to Question “2” is “Yes,” proceed to Question “3.”

3. Was plaintiff negligent?

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer to Question “3” is “No,” proceed no further and report to the court. If your answer to Question “3” is “Yes,” proceed to Question “4.”

4. Was plaintiff’s negligence a *[substantial]* factor in causing the plaintiff’s injury or damages?⁸

At least *[required number of]* jurors must agree on the answer to this question.

Yes _____ No _____

If your answer to Question “4” is “No,” proceed no further and report to the court. If your answer to Question “4” is “Yes,” proceed to Question “5.”

7 *[insert jurisdiction-specific case law]*

8 *[insert jurisdiction-specific case law]*

**MODEL JURY INSTRUCTIONS
DUI EVIDENCE**

COMPARATIVE FAULT – JUROR INTERROGATORIES (CONT.)

5. What was the percentage of fault of the defendant and what was the percentage of fault of the plaintiff?

At least *[required number of]* jurors must agree on the answer to this question.

Defendant _____%

Plaintiff _____%

Total must be 100%

4. The Joint And Several Liability Doctrine

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT COUNTY, STATE

MARY ANN SMITH, individually,		No. 04-L-0000
	Plaintiff,	
v.		Judge Phillips
CITY OF SPRINGFIELD, <i>et al.</i> ,		
	Defendants.	

DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF PROPOSED JURY INSTRUCTION ON THE JOINT AND SEVERAL LIABILITY DOCTRINE

Comes now Defendant and presents its Memorandum of Law in support of its proposed jury instruction on the effects of the joint and several liability doctrine.

INTRODUCTION

Defendant’s proposed instruction informs the jury about how the joint and several liability doctrine works and what its consequences are. The proposed instruction states:

In lawsuits such as this, all persons are jointly and severally liable for the proximate results of their negligence.

Under joint and several liability, the percentage of fault assigned to a party does not necessarily reflect the percentage of the judgment that the party will pay. In other words, a party to this case that is 1% at fault may pay as little as 0% of the judgment, or as much as 100% of the judgment. A party that is 99% at fault may pay as much as 100% of the judgment, or as little as 0% of the judgment. This is how the legal rule of joint and several liability operates.

The proposed instruction will encourage the jury to carefully examine the facts before it reaches a verdict. The instruction also will prevent jurors from speculating, possibly inaccurately,

about the impact of their decisions, which can lead a jury to shape its answers to the special verdicts contrary to its actual beliefs in a mistaken attempt to ensure a desired outcome. See 9A Charles Allen Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 2d § 2509 (2d ed. 1994).

This instruction is similar to the instructions regularly received by juries in *[this and]* many other jurisdictions about the mechanics and consequences of legal rules such as comparative negligence. For both joint and several liability and other legal issues, such instructions seek to avoid the “arbitrary, inequitable, and unintended results” that can occur when jurors “answer ‘factual’ questions ... in ignorance of the answers’ consequences.” Jordan H. Leibman et al., The Effects of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives, 35 Am. Bus. L.J. 349, 350-51 (1998).

ARGUMENT

Under the law of this state, joint and several liability provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. See *[insert case law from jurisdiction]*. The principle underlying this rule is that each defendant’s wrongful conduct is substantial enough to pay for the plaintiff’s injury, so the plaintiff should be fully compensated and should not suffer if one defendant is absent from the jurisdiction or insolvent.

Over the past two decades, the shortcomings of the joint and several liability doctrine have become increasingly apparent.¹ Often, a defendant who is only minimally at fault bears a disproportionately heavy burden. Plaintiffs routinely join a defendant who is perceived to have “deep pockets” in a negligence action solely to invoke joint and several liability. While plaintiffs may plausibly argue that this defendant contributed a few percentage points to an injury, jurors who are unaware of the effects of joint and several liability will believe that the defendant will be li-

¹ In fact, recognizing the problems that may flow from the application of full joint liability, a substantial majority of states have abolished or modified the traditional doctrine. See, e.g., Restatement of the Law Third, Torts: Apportionment of Liability § 17 cmt. a (2000) (surveying state joint liability laws).

able only for a “small contribution” to the total damage award. Julie K. Weaver, Jury Instructions on Joint and Several Liability in Washington State, 67 Wash. L. Rev. 457, 457 (1992). What the unsuspecting jury does not realize is that “[i]n reality, this deep pocket defendant may be liable for the entire award, with little hope of contribution from the party that is mainly at fault.” Id.

Allowing the jury to understand the legal effect of its answers represents the weight of the existing precedents and secondary authorities. See Wright & Miller, supra, § 2509. For example, courts *[in this state and others]* have long instructed jurors on the consequences of comparative negligence, an arena where juries in most states are informed that if they find a plaintiff 50% or more at fault, the plaintiff may not recover. See, e.g., [insert case law from jurisdiction;] Roman v. Mitchell, 413 A.2d 332 (N.J. 1980); Seppi v. Betty, 579 P.2d 683 (Idaho 1978); Thomas v. Board of Trustees of Salem Twp., 582 P.2d 271 (Kan. 1978). *[Moreover, the Legislature of this state recognized the important public policy reasons supporting this “sunshine” rule when it enacted a statutory requirement that jurors be informed of the consequences of comparative fault. CITE STATUTE.]*

[Alternative One: [Just as the [Supreme Court] [Legislature] of this state has recognized the need to reveal to the jury the potential pitfalls of assessing 1 percent liability to lightly slap the wrist of a negligent plaintiff in a comparative fault jurisdiction, a jury should also understand the effect of holding a defendant 1 percent responsible under joint liability. Like comparative negligence, joint liability can lead to unexpected results.]]

[Alternative Two: [But regardless of whether a particular jurisdiction allows instruction on the effects of comparative negligence, the equities of allowing the jury to understand the consequences of its rulings remains the same, or is even stronger, in cases involving joint and several liability.]]

If the jury understands this, it “will be much more likely to carefully examine the facts prior to reaching a verdict.” Luna v. Shockey Sheet Metal & Welding Co., 743 P.2d 61, 64 (Idaho 1987)

(holding that jurors should be instructed about the effects of joint and several liability).

The Supreme Court of Hawaii, a leading proponent of this sunshine rule, issued a key ruling on the need to inform the jury about joint and several liability in Kaeo v. Davis, 719 P.2d 396 (Haw. 1986). In this case, a passenger in a drunken driving accident sued the driver and the city for his injuries. The defense counsel for the city, which was brought into the lawsuit for allegedly failing to properly maintain its roadways, asked the trial judge to instruct the jury about the effect of joint and several liability. Id. at 395. The trial judge rejected this request.

On appeal, the Supreme Court of Hawaii vacated the judgment against both defendants and remanded the case for a new trial, explaining that “an explanation of the operation of the doctrine of joint and several liability . . . may be necessary to enable the jury to make its findings on each issue.” Id. at 396. The court noted that if jurors are not instructed by the court about the correct impact of their factual decisions, the jurors are likely to speculate about that impact – possibly incorrectly. Id. (citing Wright & Miller, supra, § 2509). The court concluded that “it would be ‘better for courts to be the vehicle by which the operation of the law is explained.’” Id.

The Supreme Court of Idaho ruled in Luna that jurors should be instructed about the effects of joint and several liability, just as they are instructed about the effects of comparative fault. 743 P.2d at 64. The court explained that “[i]rrespective of whether one considers it a virtue or a vice, the tendency of juries to adjust their verdicts to accord with their notions of justice of the cause is an inherent characteristic of juries and will be with us as long as we continue to have juries.” Id. (citing Seppi v. Betty, 579 P.2d 683 (Idaho 1978)). The Idaho Supreme Court held that, as with comparative fault,

the doctrine of joint and several liability, under which a defendant assessed a mere 1% negligence may be required to pay 100% of the plaintiff’s damages if, for some reason, the joint tortfeasor is unreachable through the judicial process, ‘poses a trap for the uninformed jury.’ An informed jury will be much more likely to carefully examine the facts prior to reaching a verdict holding a defendant even 1% at fault, no matter how cosmetically appealing a partial allocation of fault might be.

Id.

In DeCelles v. State, the Montana Supreme Court held that “a jury should be instructed about the consequences of its verdict with respect to joint and several liability.” 795 P.2d 419, 421-22 (Mont. 1990). This case arose out of a drunken driving accident, for which the injured passenger sued the drunken driver and the state of Montana. See id. The trial court instructed the jury about the effects of joint and several liability. The jury found that the state was 0% negligent, allocating 35% of the responsibility to the plaintiff and 65% to the defendant driver. The Supreme Court of Montana upheld the court’s instruction. See id. (citing Kaeo, 719 P.2d 396; Elliot Talenfeld, Instructing the Jury as to the Effect of Joint and Several Liability: Time for the Court to Address the Issue on the Merits, 20 Ariz. St. L. J. 925, 933 (1988); Price Ainsworth & Mike C. Miller, Removing the Blindfold: General Verdicts and Letting the Jury Know the Effects of Its Answers, 29 S. Tex. L. Rev. 233, 237-238 (1987)).

In its decision, the Montana Supreme Court rejected any argument that a jury’s knowledge about how joint and several liability operates may taint its impartial fact-finding function. The court noted that “the underlying thread running through these contentions is skepticism of the informed jury’s ability to fairly perform its function in the decision-making process without yielding to passion or prejudice.” Id. at 420. In rejecting attempts to “blindfold” jurors, the court analogized to its earlier decision allowing Montana juries to consider the effect of a finding of comparative negligence, heralding its faith in jurors:

[W]e expressly held that such skepticism of a jury’s ability to properly render its verdict in conformity with the law is unfounded: We think Montana juries can and should be trusted with the information about the consequences of their verdict.

Id. at 421 (citing Martel v. Montana Power Co., 752 P.2d 140 (1988)) (emphasis in original).

In sum, by instructing the jury in this case about the effects of joint and several liability, this Court will *[foster the [Supreme Court’s] [Legislature’s] public policy decisions on informing jurors of legal consequences,]* encourage more precise fact-finding, avoid “arbitrary, inequitable, and unintended results” that occur from juror speculation or lack of knowledge, and join those

courts that have found “it [is] better to equip jurors with knowledge of the effect of their findings than to let them speculate in ignorance and thus subvert the whole judicial process.” Luna, 743 P.2d at 64.

CONCLUSION

WHEREFORE FOR ALL OF THE ABOVE REASONS, Defendant respectfully submits this Memorandum of Law in support of its jury instruction regarding the application of the joint and several liability doctrine.

**MODEL JURY INSTRUCTIONS
JOINT AND SEVERAL LIABILITY**

JOINT AND SEVERAL LIABILITY

In lawsuits such as this, all persons are jointly and severally liable for the proximate results of their negligence.¹

Under joint and several liability, the percentage of fault assigned to a party does not necessarily reflect the percentage of the judgment that the party will pay.² In other words, a party to this case that is 1% at fault may pay as little as 0% of the judgment or as much as 100% of the judgment. A party that is 99% at fault may pay as much as 100% of the judgment or as little as 0% of the judgment. This is how the legal rule of joint and several liability operates.

1 *[insert jurisdiction-specific case law]*

2 *[insert jurisdiction-specific case law]; DeCelles v. State*, 795 P.2d 419 (Mont. 1990); *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61 (Idaho 1987); *Kaeo v. Davis*, 719 P.2d 387 (Haw. 1986).

5. Barring Causation Evidence In Asbestos Cases

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT COUNTY, ILLINOIS

ROBERT J. JONES, individually,

Plaintiff,

v.

ACME PRODUCTS, INC., *et al.*,

Defendants.

No. 04-L-0000

Judge Phillips

DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE TO INTRODUCE EVIDENCE OF ALTERNATIVE CAUSATION

[This model memorandum should be used only by defendants whose products contain forms of asbestos that can be shown through scientific evidence to be safer than other forms of asbestos.]

Comes now Defendant and presents its Memorandum of Law in support of its motion in limine to introduce evidence of alternative causation of Plaintiff’s alleged injuries.

I.

BACKGROUND

Plaintiff is a fifty seven-year-old man who alleges he developed personal injuries as a result of occupational exposure to defendant’s asbestos-containing product.

Defendant would show that throughout Plaintiff’s thirty-five year work history, Plaintiff was exposed to products manufactured and distributed by other companies, at varying levels of exposure and for varying periods of time, and that such exposures proximately caused Plaintiff’s alleged injuries. Defendant believes that such evidence is relevant and material to the determination of liability and the proper award of damages in this case, if indeed any liability exists. Defendant

respectfully requests this Court to reject the erroneous approach taken by Illinois trial courts and to issue an Order admitting evidence that Plaintiff was exposed to products made or sold by responsible parties that have settled, are insolvent, or are otherwise unavailable at trial, and evidence that such exposures proximately caused Plaintiff's injuries.

II.

ARGUMENT

In all other states, juries in asbestos cases can be informed that the defendant's product could not have caused the plaintiff's injuries, and that the sole proximate cause of the harm was plaintiff's exposure to someone else's product or products. *[This] [Some]* Illinois trial court[s], however, *[has] [have]* incorrectly interpreted Illinois appellate decisions to prevent an at-trial defendant from introducing evidence that the plaintiff was exposed to products made or sold by responsible parties that have settled, are insolvent, or are otherwise unavailable at trial. See Lipke v. Celotex Corp., 153 Ill. App. 3d 498, 505 N.E.2d 1213 (1st Dist.), appeal dismissed, 129 Ill. Dec. 387, 536 N.E.2d 71 (1989); Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App. 3d 781, 610 N.E.2d 683, 689 (5th Dist.), appeal denied, 152 Ill. 2d 561, 622 N.E.2d 1208 (1993), cert. denied, 510 U.S. 1177 (1994); Spain v. Owens-Corning Fiberglass Corp., 304 Ill. App. 3d 356, 710 N.E.2d 528 (4th Dist.), appeal denied, 185 Ill. 2d 667, 720 N.E.2d 1106 (1999) (together, Lipke-Kochan-Spain). As a result of such rulings, jurors are led to conclude the plaintiff was exposed only to the asbestos of the non-settling defendant, so that exposure must have caused the plaintiff's asbestos-related disease. The jury is, in fact, deceived to find liability when no liability should fairly or properly attach.

A. The Rationale for Withholding Evidence of Alternative Causation Is Obsolete and Fails to Serve a Legitimate Public Policy Purpose.

Based on outdated science, the Lipke-Kochan-Spain line of cases has been the justification for keeping Illinois juries from hearing evidence that the plaintiffs were exposed to products of responsible parties not before the court. The scientific evidence in these cases did not seem to allow

for any material distinctions to be made among a group of potential defendants, all of whom, in the courts' view, may have been equally responsible for the plaintiffs' injuries. Kochan and Spain suggested that if faced with evidence of other exposures, and left with no basis to distinguish among the quality, intensity, or nature of the exposures in judging causation, even a properly instructed jury would be confused. Thus, the courts believed the jury had to be protected from such evidence. These factual assumptions are no longer true.

Science now allows us – and juries – to make judgments about whether the product of a particular defendant in a particular case actually contributed to the plaintiff's injury. Defendants are capable of bringing forward probative evidence that would allow the jury to make significant distinctions among possible exposures as it bears on issues of causation. As one Illinois trial court has appreciated: “[T]he state of the law and the state of science of asbestos-related illnesses are not in sync.” Nolan v. Weil-McLain, No. 01-L-117, 2005 WL 724041, at *30 (Cir. Ct. Vermillion County, Ill. Mar. 21, 2005) (Order on Post-Trial Motions) (unreported), appeal docketed, No. 4-05-0328 (4th Dist. Apr. 21, 2005); see also Abadie v. Metropolitan Life Ins. Co., 784 So. 2d 46, 89 (La. Ct. App.), writ denied, 804 So. 2d 644 (La. 2001) (“Asbestos bonded in a finished product does not present significant health risks unless the product is disturbed in such a way as to free fibers in the air.”); see generally The Fairness in Asbestos Injury Resolution Act of 2003, Hearing on S. 1125 Before the Senate Comm. on the Judiciary, 108th Cong. (June 4, 2003) (statement of Dr. James D. Crapo, Professor of Medicine, National Jewish Center and University of Colorado Health Sciences Center) (“The most commonly used type of asbestos in the United States, chrysotile, has a much lower propensity to cause mesothelioma in comparison to the amphibole forms of asbestos.”).

It is wrong for the law to embody an erroneous scientific premise – and it does not have to do so here. The scientific evidence tendered in this case is very different than that at issue in Lipke-Kochan-Spain: here, the evidence will give the jury a sound basis to distinguish among the quality, intensity, or nature of the exposures in judging causation for Plaintiff's alleged injuries. In this case, there is no risk of confusing a properly instructed jury.

The holding of a case is addressed to the specific issue decided in a case. If the relevant scientific premises upon which a holding rests are different or have changed, the holding does not apply: the issue in the second case is simply different than the issue presented in the first. The common law must keep pace and reflect science.

B. Rejecting Alternative Causation Evidence Is Inconsistent With Basic Principles Of Causation.

The law of causation in Illinois is well established. “In negligence actions, as well as in strict liability cases, causation requires proof of both ‘cause in fact’ and ‘legal cause.’” Thacker v. UNR Indus., Inc., 151 Ill. 2d 354, 349, 603 N.E.2d 449, 455 (1992). Plaintiffs prove cause in fact under either the traditional “but for” test – “a defendant’s conduct is not a cause of an event if the event would have occurred without it” – or the “substantial factor” test – “the defendant’s conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about.” Id. Plaintiffs in asbestos cases have consistently tried to prove causation under the substantial factor test.

A defendant cannot escape liability under the substantial factor test merely by pointing to other potential causes. Illinois jury instructions recognize that there can be more than one cause of an injury, stating that “the proximate cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes injury.” Ill. Pattern Jury Instr. 400.04 (2005) (strict liability); Ill. Pattern Jury Instr. 15.01 (negligence). In other words, a jury can be informed of different causes without having to conclude that the defendant at bar is not liable. There is no reason to distrust the ability of jurors in possession of all relevant facts to weigh the different causes and make a determination as to whether the defendant’s conduct was a substantial factor in causing the plaintiff’s harm. Even where the evidence is simply of other exposures much like that from Defendant’s product, a properly instructed jury would be fair to Plaintiff. Evidence of other exposures provides basic context for understanding how the plaintiff and defendant come to stand before the jury. Juries can make

distinctions based on the evidence they hear. There is no reason to protect a jury from the truth.

Indeed, as the leading case on competing cause in Illinois, Leonardi v. Loyola Univ. of Chicago, 168 Ill. 2d 83, 658 N.E.2d 450 (1995), makes clear, the substantial factor test demands context: the jury hears the entirety of the evidence and then determines whether a particular cause was actually a substantial factor. The issue of what is in fact a substantial factor in causing an asbestos-related injury is relative to the factual circumstances in an individual case; a jury cannot determine what is “substantial” unless it has an appreciation for the whole of the situation.

In Leonardi, the trial court allowed defendants in a medical malpractice case to introduce evidence that attempted to establish that a third party was the sole proximate cause of the plaintiff’s injury. The Illinois Supreme Court affirmed, finding that the plaintiff’s reliance on Lipke to exclude such evidence was misplaced because Lipke “presumes that a defendant’s conduct is at least a proximate cause of the plaintiff’s injury.” 168 Ill. 2d at 93, 658 N.E.2d at 455 (citing the Restatement (Second) of Torts § 433B, cmt. g (1965)). “Obviously,” the Court said, “if there is evidence that negates causation, a defendant should show it.” 168 Ill. 2d at 94, 658 N.E.2d at 455.

The Leonardi Court concluded that “an answer which denies that an injury was the result of or caused by the defendant’s conduct is sufficient to permit the defendant in support of his position to present evidence that the injury was the result of another cause.” Id. (emphasis added). The Illinois Supreme Court has thus made its position clear: Courts should permit defendants “to present evidence that the injury was the result of another cause” when the defendant offers evidence that it was not a proximate cause of the injury. See also Simmons v. Garces, 198 Ill. 2d 541, 572, 763 N.E.2d 720, 740 (2002) (“defendant is always free to offer evidence that the conduct of a third party was the sole proximate cause of plaintiff’s injuries”) (emphasis added).

Issues of causation are often difficult, requiring careful consideration and thoughtful discussion. This makes them all the more appropriate for jury resolution. Where the evidence and arguments are hotly contested, it is essential that juries be allowed to decide issues in their full

context. Depriving juries of evidence that is material to their determination distorts the jury function.

III.

CONCLUSION

WHEREFORE FOR ALL OF THE ABOVE REASONS, Defendant respectfully submits this Memorandum of Law in Support of its motion in limine seeking admission of evidence of alternative causation of Plaintiff's alleged injuries.

**MODEL JURY INSTRUCTIONS
ALTERNATIVE CAUSATION**

PROXIMATE CAUSE

Proximate cause is any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.¹

¹ See Ill. Pattern Jury Inst. –Civ. 15.01 (2005) (negligence); Ill. Pattern Jury. Inst. –Civ. 400.04 (2005) (strict liability).

**MODEL JURY INSTRUCTIONS
ALTERNATIVE CAUSATION**

ALTERNATIVE CAUSATION

If you decide that *[a defendant was] [the defendants were]* negligent and that *[his] [their]* negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.²

However, if you decide that the sole proximate cause of injury to the plaintiff was not the conduct of the defendant, but the conduct of *[some person who is or is not a party] [persons who are or are not parties]* to the suit, then your verdict should be for the defendant.³

2 See Ill. Pattern Jury Instr. –Civ. 12.04 (2005) (alternative causation).

3 See *id.*



*How Defense Counsel Can
Change the Common Law of Torts:
Moving Toward The Fully
Informed Jury*

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