

Moving Toward the Fully Informed Jury

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I. INTRODUCTION	22
II. FIVE EXAMPLES OF HIGHLY RELEVANT EVIDENCE THE JURY WILL NOT HEAR	24
A. THE JURY WILL NOT KNOW THE PLAINTIFF HAS ALREADY RECEIVED COMPENSATION FOR THE INJURY	24
1. Reasoning Behind the Collateral Source Rule	25
2. Criticism of the Collateral Source Rule	26
3. Cases Highlight the Impact of the Collateral Source Rule .	27
4. A Better Approach: Let the Jury Decide Fair Compensation Based on All the Evidence	30

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B.	THE PLAINTIFF WAS NOT WEARING A SEATBELT	31
1.	Court Decisions Blindfolding Jurors to Evidence that the Plaintiff Failed to Wear a Seatbelt are Antiquated	32
2.	Concepts of Comparative Fault Abrogate Earlier Rationales for Hiding this Evidence for the Jury	35
3.	Evolving Public Understanding About the Advantages of Seatbelts Eliminates Earlier Reasons for Hiding this Evidence from the Jury	36
C.	THE DRIVER WAS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, SPEEDING, OR ASLEEP AT THE WHEEL	37
1.	The Old Rule: Covering up the Plaintiff's Fault	37
2.	The Impact of Comparative Fault	38
3.	The Jury Requires a Full Understanding of the Facts of the Case, Allowing Them to Make an Informed Decision	40
D.	JOINT AND SEVERAL LIABILITY: POSING A TRAP FOR THE UNINFORMED JURY	40
1.	Joint and Several Liability, in Brief	41
2.	Misleading the Jury Through Joint and Several Liability	43
3.	Some Courts Inform Jurors as to the Effect of Joint and Several Liability so That They can Make an Informed Decision	44
E.	THE PLAINTIFF WAS EXPOSED TO ASBESTOS FROM SOURCES OTHER THAN THE DEFENDANT	47
III.	CONCLUSION	50

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Rationale for the Collateral Source Rule

Why is the jury barred from learning that eighty percent of the plaintiff's expenses were already paid? The basis for keeping this information from the jury, "the Collateral Source Rule," dates back to 1854.⁷ The collateral source rule is intended to protect against the risk that a jury may find no liability if it knows the plaintiff was compensated for their injury by other sources. Such evidence could also be prejudicial or confusing to the jury in violation of Rule 403 of the Federal Rules of Evidence, or the state equivalent.⁸

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

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

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

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

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

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

2. Criticism of the Collateral Source Rule

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

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

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

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

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

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

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

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

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

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

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

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

3. Cases Highlighting the Impact of the Collateral Source Rule

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

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

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

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

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

21. *Id.* at 801.

22. *Id.*

23. *Id.*

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

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

The collateral source rule is also used to hide important evidence relating to responsibility in automobile accident cases. In *Votolato v. Merandi*,²⁹ a police car collided with a Chevy Blazer, causing the Blazer to flip over, killing a 16-year-old passenger. The girl's mother settled with the insurance carrier of the Blazer's driver for \$95,000.³⁰ She then sued the City of Providence and the police officer whose car collided with the Blazer.³¹ At trial, the defendant questioned the plaintiff about the \$95,000 settlement, arguing this information was relevant to the jury for purposes of Rhode Island's set-off in allocating

24. *Id.*

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

26. *Id.*

27. *Id.* at 803.

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

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

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

30. *Id.* at 459.

31. *Id.* at 458.

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

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

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

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

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

33. *Id.* at 458.

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

35. *Id.* at 461-62.

36. *Id.* at 462.

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

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

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

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

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

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

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

39. *Id.* at 278-79.

40. *Id.* at 278.

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

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

43. *See id.*

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

B. The Plaintiff Was Not Wearing a Seatbelt

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

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

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

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

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

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

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

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

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

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

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

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

“seatbelt defense.”⁵²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

62. *Id.* at 917-18.

63. *Id.* at 916-17.

64. *Id.* at 917.

65. *Id.* at 917-18.

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

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

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

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

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

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

66. *Id.*

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

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

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

70. 517 P.2d 458.

71. *Id.* at 458.

72. *Id.* at 458-59.

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

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

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

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

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

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

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

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

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

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

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

C. The Driver Was Under the Influence of Alcohol or Drugs, Speeding, or Asleep at the Wheel

Not only are juries kept in the dark about whether a plaintiff was wearing a seatbelt, but juries may not even know whether an individual contributed to his or her own injuries because the individual was driving under the influence of alcohol or drugs, speeding, or falling asleep at the wheel. When jurors are not informed of a driver's impairment that may have contributed to a claimed injury, they are missing a key fact they might find helpful in allocating responsibility.

1. The Old Rule: Covering up the Plaintiff's Fault

The inception of strict products liability introduced the problem of what courts should do about the misconduct of plaintiffs that may have led to or exacerbated their injuries. Under the traditional formulation of strict liability, jurors were not permitted to consider the negligence of plaintiffs in determining the amount of their recovery.⁷⁹ Courts have struggled with the fairness of this old 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.⁸⁰

Under the old rule, 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 drunk or on illegal drugs at the time of the accident but alleged the car brakes failed.

Take, for instance, the case of *Mercurio v. Nissan Motor Corporation*.⁸¹ In *Mercurio*, the wife of a driver suffered severe head injuries after the car struck a tree at three o'clock in the morning, and sued the manufacturer of his car alleging the car was not crashworthy.⁸² Evidence suggested that at the time of the accident, the driver had a blood alcohol level of at least 0.18%, well over the legal limit in the state of Ohio.⁸³ The plaintiff filed a motion *in limine* to exclude all evidence of the driver's intoxication. The trial court granted the motion, reasoning that "[t]here is a significant risk that a jury could misuse the evidence by deciding that an intoxicated driver is not 'deserving' of relief."⁸⁴ The court denied the relevance of the plaintiff's drinking in the product liability case. Rather, it found that drunk drivers are "entitled" to safe cars and perhaps "need"

79. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. N (1964).

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

81. 81 F. Supp. 2d 859 (N.D. Ohio 2000) (applying Ohio law).

82. *Id.* at 860.

83. *Id.*

84. *Id.* at 861.

them much more than sober drivers:

The fact that a collision may have been caused by the driver's intoxication, as opposed to another form of negligence, does not reduce the manufacturer's duty to provide a reasonably safe vehicle. The Court is reminded of the old adage that "[a] drunken man is as much entitled to a safe street as a sober one, and much more in need of it."⁸⁵

Similarly, in *Gerow v. Mitch Crawford Holiday Motors*,⁸⁶ the surviving adult children of parents who died in a car accident sued the manufacturer in a product liability action. While the wife was driving and the husband was in the passenger's seat, the car left the highway, straddled the guardrail, and struck a bridge support pillar on a highway overpass.⁸⁷ Gasoline spilled from the ruptured fuel tank, consuming the vehicle in flames, resulting in the couple's death.⁸⁸ The plaintiffs alleged that the fuel tank was defectively designed, making it more apt to rupture.⁸⁹

In his closing argument, the defense counsel argued to the jury evidence that the wife had fallen asleep at the wheel of the car.⁹⁰ The attorney suggested there is duty to be "conscious, to be awake when [one is] driving a vehicle at 55 and 60 miles per hour on open roads."⁹¹ A Missouri appellate court determined this argument confused the jury by "inappropriately suggest[ing] comparative fault in the context of a claim which should have been centered entirely on whether the design of the vehicle and placement of the fuel tank contributed to the fuel-fed fire."⁹² The court held that the "error" of allowing the jury to consider that the driver may have fallen asleep at the wheel before the crash compelled it to reverse and remand the case.⁹³

2. The Impact of Comparative Fault

Comparative fault principles can solve this dilemma. As one comparative negligence treatise suggests, "it is already evident that comparative fault principles may be particularly helpful in resolving a problem that has caused great confusion in the states where contributory negligence is a complete defense—the problem of the plaintiff's misconduct in strict or product liability cases."⁹⁴

The Restatement (Third) of Torts: Products Liability recognizes that "the

85. *Id.* (citing *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460, 461 (Cal. 1855)).

86. 987 S.W.2d 359 (Mo. Ct. App. 1999).

87. *Id.* at 361.

88. *Id.*

89. *Id.*

90. *Id.* at 362.

91. *Gerow*, 987 S.W.2d at 362.

92. *Id.* at 363.

93. *Id.*

94. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, *supra* note 78, at § 11-8.

fault of the plaintiff is relevant in assessing liability for product-caused harm.”⁹⁵ It takes the approach that jurors should be allowed to consider evidence of comparative fault in strict liability cases, stating:

A plaintiff’s recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff’s conduct fails to conform to generally applicable rules establishing appropriate standards of care.⁹⁶

In allowing juries to consider evidence of the plaintiff’s negligence in a products liability suit, the Restatement (Third) repudiates the approach of the earlier Restatement (Second) of Torts.⁹⁷ The Restatement (Third) explains that when the Restatement (Second) was published in 1964, the overwhelming majority rule treated contributory negligence as a total bar to recovery. As a result, “[u]nderstandably, the [American Law] Institute was reluctant to bar a plaintiff’s products liability claim in tort based on conduct that was not egregious.”⁹⁸

The Restatement (Third) rejected its former approach as outdated after the emergence of the comparative fault doctrine.⁹⁹ The Restatement (Third) notes that today, a vast majority of jurisdictions apply the comparative fault doctrine, allowing plaintiffs to still recover to some degree, even if a jury finds them partially at fault.¹⁰⁰ It contends that in this age of comparative fault, no good reason remains to exclude from the jury’s consideration all evidence of plaintiff negligence in products liability claims.¹⁰¹

The Restatement (Third) notes that most jurisdictions now allow juries to consider evidence of plaintiff negligence in a product liability case.¹⁰² These courts provide several reasons for their rulings. One reason is the unfairness of rewarding a negligent plaintiff with the same amount of damages as a plaintiff who took all precautions.¹⁰³ Another reason is the economic inefficiency of not

95. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17 cmt. a (1998) [hereinafter “RESTATEMENT THIRD”].

96. *Id.* at § 17(a).

97. RESTATEMENT (SECOND) OF TORTS § 402A (1964). Under Comment n to Section 402A of the Restatement (Second) of Torts, contributory negligence was no defense to strict liability, but assumption of the risk was a defense. *Id.* Victor Schwartz’s Comparative Negligence treatise suggests that today, “[t]here may be no need to draw these shadowy lines in a comparative negligence jurisdiction; rather, assumption of risk can be treated as a form of contributory negligence constituting a basis for apportionment under the comparative negligence statutes.” SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 78, at § 11-6(b).

98. RESTATEMENT THIRD § 17 cmt. a.

99. *Id.* (noting that “[a] strong majority of jurisdictions apply the comparative responsibility doctrine to product liability actions”).

100. *Id.* Today, “strict liability is not usually ‘strict,’” a change from its beginnings. SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 78, at § 11-1.

101. RESTATEMENT THIRD § 17 cmt. a.

102. *Id.* § 17 cmt. a, reporters’ notes.

103. *See, e.g.,* Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1568 (D. Vt. 1985).

allowing the jury to consider evidence of the plaintiff's fault. As one court explained:

Unfairness, however, is not the only serious flaw of virtually ignoring plaintiff and third party misconduct in strict products liability actions. The failure to allocate accident costs in proportion to the parties' relative abilities to prevent or reduce those costs is economically inefficient.¹⁰⁴

Courts also reason that allowing evidence of plaintiff negligence keeps plaintiffs accountable for their actions. "[I]t is unwise to relieve users and consumers of all responsibility for safe product use and consumption."¹⁰⁵ 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.¹⁰⁶

3. The Jury Requires a Full Understanding of the Facts of the Case, Allowing Them to Make an Informed Decision

Despite the introduction of comparative fault and the movement to adopt the approach of the Restatement (Third), some courts "either refuse to recognize the doctrine of comparative fault as a defense to strict products liability or limit its application to cases in which the plaintiff has voluntarily and unreasonably assumed a known risk."¹⁰⁷ Jurors sitting in some courts remain in the dark as to whether the individual seeking compensation in an accident was speeding, was under the influence of alcohol or drugs, or was knowingly operating a vehicle while sleep deprived. Allowing the jury to consider this evidence empowers them to reduce the plaintiff's recovery if they decide that, under all the circumstances, holding the plaintiff partially responsible would be just. Again, jurors would surely want to know these facts.

D. Joint and Several Liability: Posing a Trap for the Uninformed Jury

Some courts and legislatures employ "blindfold rules"¹⁰⁸ to prohibit disclosing to the jury the legal consequences of joint and several liability,¹⁰⁹ a doctrine

104. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 425 (Tex. 1984).

105. RESTATEMENT THIRD § 17 cmt. a, reporters' note.

106. *See generally* Swajian 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).

107. RESTATEMENT THIRD § 17 cmt. a, reporters' note.

108. *See generally* Jordan H. Leibman, Robert B. Bennett, Jr. & Richard Fetter, *The Effect 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 (1998).

109. *See, e.g.*, COLO. REV. STAT. § 13-21-111.5(5) (1997); *Brodsky v. Grinnell Haulers, Inc.*, 827 A.2d 1104 (N.J. Super. Ct. App. Div. 2003), *cert. granted*, 840 A.2d 259 (2003); *Dranzo v. Winterhalter*, 577 A.2d 1349 (Pa. Super. Ct. 1990), 585 A.2d 469 (Pa. 1991); *Fernanders v. Marks Constr. of S.C., Inc.*, 499 S.E.2d 509 (S.C. Ct. App. 1998); *Lacy v. CSX Transp., Inc.*, 520 S.E.2d 418 (W. Va. 1999).

which “poses a trap for the uninformed jury.”¹¹⁰ These courts hold that “[i]nformation beyond what is necessary to try the facts in dispute should be withheld from the jury lest it be tempted by sympathy or bias to veer from an objective appraisal of the evidence to weigh it instead in accordance with a predetermined and desired outcome.”¹¹¹ In these courts, jurors never learn that under joint and several liability, holding a minor defendant even 1% at fault could result in that defendant becoming responsible for 100% of the judgment, or, in some states, finding the plaintiff 1% at fault can greatly limit his or her recovery.

In contrast, courts with “sunshine rules”¹¹² believe juries want to learn and should learn the effects of joint and several liability. These courts believe that “answer[ing] ‘factual’ questions . . . in ignorance of the answers’ consequences can produce arbitrary, inequitable, and unintended results.”¹¹³ These jurisdictions put faith in a jury responsible enough to handle knowledge of the way the law operates.

1. Joint and Several Liability, in Brief

The rule of joint liability, commonly called 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.¹¹⁴ The principle underlying joint liability 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 is insolvent. Over the past two decades, the shortcomings of joint liability rules have become increasingly apparent. In many of its operations, it means that a defendant only minimally at fault bears a disproportionate burden.

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.¹¹⁵ As the Restatement (Third) explains, “[t]he clear trend over the past several decades has been a move away from joint and several liability.”¹¹⁶ Sixteen states have entirely abolished joint liability and replaced it with pure several liability, under which each defendant is liable for its proportionate

110. See *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64 (Idaho 1987); See also, *Kaao v. Davis*, 719 P.2d 387, 395 (Haw. 1986); *Reese v. Werts Corp.*, 379 N.W.2d 1 (Iowa 1985); *DeCelles v. State*, 795 P.2d 419, 421 (Mont. 1990); *Coryell v. Town of Pinedale*, 745 P.2d 883 (Wyo. 1987) (superceded by statute eliminating joint and several liability).

111. See *Leibman*, *supra* note 108, at 350.

112. See generally *id.* at 351.

113. *Id.*

114. See *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197 (Ill. 1983) (superceded by statute retaining joint and several liability).

115. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 17 cmt. a (2000) (surveying state joint liability laws).

116. *Id.* § 17 cmt. a, reporters’ note.

share of fault for the harm.¹¹⁷ Four states have eliminated joint liability for noneconomic damages.¹¹⁸ Fourteen states have abolished joint liability in cases where the defendant's comparative responsibility is below some threshold level.¹¹⁹ Some states provide other limits on joint liability.¹²⁰ That leaves just a

117. See ALASKA STAT. § 09.17.080 (Michie 2003); ARIZ. REV. STAT. § 12-2506 (2003); ARK. CODE ANN. § 16-55-201 (Michie 2004); COLO. REV. STAT. § 13-21-111.5 (2003); IND. CODE ANN. § 34-51-2-8 (Michie 2003); IDAHO CODE § 6-803 (Michie 2003) (exempting cases arising out of a violation of state or federal law related to hazardous waste or an action arising out of the manufacture of medical devices or pharmaceutical products); KY. REV. STAT. ANN. § 411.182 (2003); LA. CIV. CODE ANN. arts. 1804, 2323-24 (2003); MICH. COMP. LAWS §§ 600.6304(4), 600.6312 (2001) (exempting certain medical malpractice claims and criminal conduct involving gross negligence or the use of alcohol or drugs); N.D. CENT. CODE § 32-03.2-02 (2003); OR. REV. STAT. § 31.610 (2004) (exempting cases resulting from violation of federal or state statute regarding spill, release, or disposal of hazardous waste arising out of a violation of state or federal law related to hazardous waste or an action arising out of the manufacture of medical devices or pharmaceutical products); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992); UTAH CODE ANN. § 78-27-40 (2003); WYO. STAT. ANN. § 1-1-109 (2003); Brown v. Keill, 580 P.2d 867 (Kan. 1978); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503 (Ky. 1985); Anderson v. O'Donohue, 677 P.2d 648 (Okla. 1983) (abolishing joint liability where plaintiff was at fault).

118. See CAL. CIV. CODE § 1431.2 (Deering 2003); IOWA CODE § 668.4 (2003); MISS. CODE ANN. § 85-5-7(8) (2003); NEB. REV. STAT. § 25-21, 185.10 (2003); OHIO REV. CODE ANN. § 2307.22 (Anderson 2003). Cf. N.Y. C.P.L.R. §§ 1601-1602 (Consol. 2003) (joint liability abolished for noneconomic damages for defendants less than 50% at fault except where defendant acted with reckless disregard for the safety of others, in the case of unlawfully released hazardous substances, and in product liability actions where the manufacturer of the product is not a party to the action, jurisdiction over the manufacturer could not be obtained, and liability would have been imposed on the manufacturer through strict liability, among other statutorily defined exemptions).

119. See, e.g., FLA. STAT. ANN. § 768.81 (West 2003) (if plaintiff is at fault, joint liability is abolished for: (a) any defendant found 10% or less at fault; (b) economic damages in excess of \$200,000 for any defendant found to be more than 10% but less than 25% at fault; (c) economic damages in excess of \$500,000 for any defendant found at least 25% but no more than 50% at fault; (d) economic damages in excess of \$1 million for any defendant found more than 50% at fault. If plaintiff is not at fault, joint liability abolished for: (a) any defendant found to be less than 10% at fault; (b) economic damages in excess of \$500,000 for any defendant found at least 25% but not more than 50% at fault; (c) economic damages in excess of \$1 million for any defendant found at least 25% but not more than 50% at fault; and (d) economic damages in excess of \$2 million for any defendant found more than 50% at fault. Joint liability does not apply to any defendant who is found to be less at fault than the plaintiff.); IOWA CODE § 668.4 (2003) (joint liability abolished for economic damages for defendants less than 50% at fault); MINN. STAT. § 604.02 (2003) (joint liability abolished for defendants less than 50% at fault); MISS. CODE § 85-5-7(8) (2003) (abolishing joint liability for economic damages for defendants found less than 30% at fault; defendants found 30% or more at fault are liable only to the extent needed for the plaintiff to recover 50% of his or her economic damages); MONT. CODE ANN. § 27-1-705 (2003) (joint liability abolished for defendants less than 50% at fault); N.H. REV. STAT. ANN. § 507:7-e (2001) (abolishing joint liability for defendants less than 50% at fault); OHIO REV. CODE ANN. § 2307.22 (Anderson 2003) (abolishing joint liability for defendants found to be less than 50% at fault); 42 PA. CONS. STAT. § 7102 (2004) (abolishing joint liability for defendants found to be less than 60% at fault); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 2004) (abolishing joint liability for defendants found to be less than 50% at fault); WISC. STAT. ANN. § 895.045(1) (West 2002) (abolishing joint liability for defendants found to be less than 51% at fault).

120. See CONN. GEN. STAT. § 52-572h (2003) (defendants in negligence actions generally liable only for percentage of fault); GA. CODE ANN. § 51-12-33 (2003) (joint liability can be disregarded if the plaintiff is partially at fault); 735 ILL. COMP. STAT. 5/2-1117 (2004) (joint and several liability abolished for defendants less than 25% at fault); 740 ILL. COMP. STAT. 100/3 (2004) (if any defendant is insolvent, remaining defendants must satisfy the insolvent defendant's responsibility in proportion to their degree of responsibility); MASS. GEN. LAWS ANN. ch. 231B §§ 1-2 (2003) (each defendant liable to the extent of

distinct minority of sixteen jurisdictions that have yet to abolish or modify their joint liability rules.¹²¹

2. Misleading the Jury Through Joint and Several Liability

Joint and several liability may produce results a jury never intended when making their decision. Often plaintiffs will join a state, city, county, school, hospital, large corporation, or other “deep pocket” defendant in a negligence action solely to impose joint and several liability. In these situations, “[a]n argument by the plaintiff that this defendant contributed a few percentage points to an injury is often plausible.”¹²² If the jury is not informed of the effects of joint and several liability, it may believe “this defendant will only be liable for a small contribution to the total damage award and the main defendant will be liable for the remainder.”¹²³ 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.”¹²⁴

Providing juries with information on the impact of joint and several liability also works to the benefit of plaintiffs in certain states. Florida,¹²⁵ Georgia,¹²⁶ Oklahoma,¹²⁷ and Washington¹²⁸ law provides that full joint and several liabil-

that defendant’s proportionate share of the entire common liability; thus in a two defendant case, each defendant is liable up to 50% of the judgment); MO. REV. STAT. § 537.067 (2003) (joint liability limited to two times defendant’s percentage of fault if plaintiff was at fault); S.D. CODIFIED LAWS § 15-8-15.1 (Michie 2003) (joint liability limited to two times defendant’s percentage of fault for any defendant found to be less than 50% at fault).

121. Full joint liability continues to apply in Alabama, Delaware, District of Columbia, Hawaii, Maine, Maryland, Nevada (for product liability cases); New Jersey (for asbestos cases), New Mexico (for strict liability cases), North Carolina, Rhode Island, South Carolina, Vermont, Virginia, Washington, and West Virginia (except in medical malpractice cases).

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

123. *Id.*

124. *Id.*

125. FLA. STAT. ANN. § 768.81 (West 2003) (providing that if the plaintiff is at fault, joint liability is abolished for: (a) any defendant found 10% or less at fault; (b) economic damages in excess of \$200,000 for any defendant found to be more than 10% but less than 25% at fault; (c) economic damages in excess of \$500,000 for any defendant found at least 25% but no more than 50% at fault; (d) economic damages in excess of \$1 million for any defendant found more than 50% at fault. If plaintiff is not at fault, joint liability abolished for: (a) any defendant found to be less than 10% at fault; (b) economic damages in excess of \$500,000 for any defendant found at least 25% but not more than 50% at fault; (c) economic damages in excess of \$1 million for any defendant found at least 25% but not more than 50% at fault; and (d) economic damages in excess of \$2 million for any defendant found more than 50% at fault. Joint liability does not apply to any defendant who is found to be less at fault than the plaintiff.).

126. GA. CODE ANN. § 51-12-33 (2003) (providing that joint liability applies, but can be disregarded in certain cases where the plaintiff is partially at fault).

127. *Anderson v. O’Donohue*, 677 P.2d 648 (Okla. 1983) (abolishing joint liability when the plaintiff is at fault); *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978) (also abolishing joint liability when the plaintiff is at fault).

128. WASH. REV. CODE ANN. § 4.22.070(1)(b) (West 2003) (abolishing joint liability when the plaintiff is found to be at fault, except in cases involving hazardous wastes or substances, tortious interference with business relationships, and the manufacture or marketing of fungible products in

ity only applies when the plaintiff is not at fault. In these states, if juries find the plaintiff even minimally at fault, joint and several liability cannot come into effect to ensure the plaintiff receives compensation.

A hypothetical may best demonstrate this potential trap.¹²⁹ Two cars collide head-on on a highway in Washington state. One driver, Anne, who is severely injured, sues the state for negligent highway design and the other driver, Bob, for negligent driving. Anne brings suit in Washington state, where the doctrine of modified joint and several liability dictates that joint liability between defendants only exists if the plaintiff is totally free from fault.¹³⁰ If the court does not instruct jurors on the effect of joint and several liability, the jury's assignment of any fault either to the State or to Anne may have unintended consequences. If the jury assigns no fault to Anne, but assigns one percent fault to the State and the rest to Bob, the State could become liable for the entire award if Bob is insolvent. On the other hand, if the jury assigns one percent fault to Anne, one percent to the State, and the rest to Bob, joint and several liability will not apply, and so if Bob is insolvent, Anne can only recover one percent of her damages from the State. As a result of these possible consequences, both the State and Anne may wish an instruction on joint and several liability. Here, a jury's uninformed determination to administer a mild reprimand may dramatically affect a plaintiff's recovery or a defendant's liability. In order to alleviate this problem, courts should be allowed to admit "the sunshine of legal knowledge into the jury room" to guide jurors in appropriate cases.¹³¹

3. Some Courts Inform Jurors as to the Effect of Joint and Several Liability So that They Can Make an Informed Decision

Renowned Professors Charles Allen Wright and Arthur R. Miller observe in their Federal Practice and Procedure treatise that allowing the jury to understand the legal effect of its answers "seems to represent the weight of the existing precedents and secondary authorities."¹³² They state that any "attempt to keep the jury in the dark as to the effect of its answers is likely to be unavailing" because "there is always the danger that the jury will guess wrong about the law, and may shape its answers to the special verdicts, contrary to its actual beliefs, in a mistaken attempt to ensure the results it deems desirable."¹³³ In the states that retain joint liability, some courts have followed this reasoning.¹³⁴

generic form); *see also* Washburn v. Beatt Equip. Co., 840 P.2d 860 (Wash. 1992); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989), *amended by* 780 P.2d 260 (Wash. 1989).

129. *See* Weaver, *supra* note 122 at 457 (1992) (the hypothetical is paraphrased from this Comment).

130. *See supra* note 128.

131. *See generally* Leibman, *supra* note 108 at 351 (detailing the arguments for and against allowing juries to learn the effects of apportioning fault between or among defendants).

132. 9A CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE AND PROCEDURE: CIVIL 2d § 2509 (2d ed. 1994).

133. *Id.*

134. *See, e.g.*, Kaeo v. Davis, 719 P.2d 387, 396 (Haw. 1986).

Courts 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.¹³⁵ Courts allowing juror instruction on joint liability analogize that like comparative negligence, joint liability may “pose a trap for the uninformed jury.”¹³⁶ Just as there is a need to reveal to the jury the potential pitfall of assessing 1% liability to lightly slap the wrist of a barely negligent plaintiff in a comparative fault jurisdiction, a jury should also understand the effect of holding a defendant 1% responsible under joint liability. If the jury understands this, it “will be much more likely to carefully examine the facts prior to reaching a verdict.”¹³⁷ These courts conclude that like comparative negligence, joint liability can lead to unexpected results, results jurors should understand to enable them to knowledgeably render a decision.¹³⁸

A leading proponent of this “sunshine rule” is the Supreme Court of Hawaii. The Hawaii Supreme Court’s key ruling on informing the jury about joint and several liability occurred in a 1986 drunk driving accident case, where the passenger sued the driver and the city for his injuries.¹³⁹ The defense counsel for the city, which was brought into the lawsuit for allegedly failing to properly maintain its roadways, suggested to the trial judge that the jury be given an instruction on the effect of joint and several liability.¹⁴⁰ Such an instruction would educate the jury that if it found the defendant 10%, 5%, or even just 1% liable, that defendant may be required to pay the entire judgment. The trial judge dismissed the suggestion, but the defense lawyer brought the issue to the attention of the Supreme Court of Hawaii.

The Supreme Court of Hawaii overruled the trial judge. It held, “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.”¹⁴¹ 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.¹⁴² The court concluded, “it would be ‘better for courts to be the vehicle by which the operation of the law is explained.’”¹⁴³

135. *See, e.g., id.* at 395-96; *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64 (Idaho 1987); *DeCelles v. State*, 795 P.2d 419, 421 (Mont. 1990).

136. *Luna*, 743 P.2d at 64.

137. *Id.*

138. *But see Brodsky*, 827 A.2d at 1113 (holding jurors do not have the same need to learn about the effects of joint and several liability as they do contributory negligence); *Dranzo v. Winterhalter*, 577 A.2d 1349, 1356 (Pa. Super. Ct. 1990), *cert. denied*, 585 A.2d 469 (Pa. 1991) (same); *Fernanders v. Marks Constr. of S.C., Inc.*, 499 S.E.2d 509, 510-11 (S.C. Ct. App. 1998) (same); *Lacy v. CSX Transport, Inc.*, 520 S.E.2d 418, 429 (W. Va. 1999) (same).

139. *See Kaeo*, 719 P.2d at 387.

140. *Id.* at 394.

141. *Id.* at 396.

142. *Id.* (quoting *Simpson v. Anderson*, 517 P.2d 416, 419 (Colo. Ct. App. 1973)).

143. *Id.*

Informing the jurors about the effects of their decision made a demonstrated difference in the case. The defendant, the City of Honolulu, originally was found 1% liable with the remainder of the liability falling on the driver.¹⁴⁴ In practice, this meant that the city could be required to pay the plaintiff's entire award. After the case was remanded to trial and the jury was instructed about the effect of punitive damages, it found, as one might expect, no liability on behalf of the City of Honolulu. The jury sent the message it was not going to saddle a minor defendant, whose fault was speculative at best, with huge liability costs.

The Supreme Court of Idaho soon issued a similar ruling.¹⁴⁵ In its decision, it analogized to prior decisions informing jurors of the effects of comparative fault, which it held “pose[] a trap for the uninformed jury.”¹⁴⁶ The court extended this reasoning into the comparative negligence context, stating: “[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.”¹⁴⁷ The Idaho court held that as with comparative fault:

[T]he 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.¹⁴⁸

Another case following the lead of Hawaii involved a drunk driving accident where the injured passenger sued the driver and the state of Montana. In this case, a Montana state trial court instructed the jury on the effect of joint and several liability.¹⁴⁹ The jury found that the state was 0% negligent, allocating instead 35% of responsibility to the plaintiff and 65% to the defendant driver. The Supreme Court of Montana upheld the court's instruction on appeal.¹⁵⁰

In its decision, the court cited several supportive law review articles and the Hawaii ruling, holding “a jury should be instructed about the consequences of its verdict with respect to joint and several liability.”¹⁵¹ Regarding the opposing viewpoint—that a jury's knowledge about how joint and several liability operates may taint their impartial fact-finding function—the court noted, “the under-

144. See *Kaeo*, 719 P.2d at 390.

145. See *Luna*, 743 P.2d at 61.

146. *Id.* at 64.

147. *Id.* (citing *Seppi v. Betty*, 579 P.2d 683, 690 (Idaho 1978)).

148. *Id.*

149. See *DeCelles v. State*, 795 P.2d 419, 419-20 (Mont. 1990).

150. *Id.* at 420.

151. *Id.* at 421.

lying 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."¹⁵² In rejecting this "blindfold" approach, the court analogized to its decision allowing Montana juries to consider the effect of a finding of contributory 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.*¹⁵³

These courts have found that "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.'"¹⁵⁴ Other jurisdictions should follow their example.

E. The Plaintiff Was Exposed to Asbestos from Sources Other Than the Defendant

Sometimes courts prohibit jurors from learning information pertinent to the issue of causation in toxic tort cases. For example, until the 1970s, asbestos was widely used in the workplace because of its durability and fire-retardant capacity. It was later found that exposure to asbestos, particularly for prolonged periods, could cause various diseases.

In the lawsuits stemming from this situation, often an individual has developed an asbestos-related disease after exposure to the substance throughout his or her career in a number of environments. When other potentially responsible parties have settled, are insolvent, or are otherwise unavailable, some courts do not permit the sole company brought into court to introduce evidence of the other companies' responsibility. For example, a plaintiff's employer is often not available to sue due to workers' compensation laws. This leaves a manufacturer that is brought into court unable to introduce the plaintiff's historical workplace exposures. Thus, the jury will not know that the plaintiff may have worked with raw asbestos fiber in that occupation, but just that there was some minimal exposure to the manufacturer's asbestos-containing product. In addition, the exposure necessary to cause disease differs by fiber type and dose. In some cases, short-term exposure in one environment may be more likely to cause disease than exposure over a longer time period in another.¹⁵⁵ Moreover, given

152. *Id.* at 420.

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

154. *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64 (Idaho 1987) (quoting *Seppi*, 579 P.2d at 690).

155. For example, evidence suggests that Amphibole forms of asbestos may pose a greater health risk than the widely-used commercial asbestos, Chrysotile, because the Amphibole forms are more rigid and less soluble, causing the particles to penetrate the lung tissue and remain within the tissue for a

the long latency period for asbestos-related diseases, it is important that juries have all the facts surrounding responsibility so that they can fairly sort out responsibility. Hiding such information from jurors can lead to juror misconception and confusion on the key issue of causation.

The Illinois courts have carved out this special rule in asbestos cases, while rejecting its application in other contexts.¹⁵⁶ In *Lipke v. Celotex Corp.*,¹⁵⁷ the foundational case for this approach, a worker sued twenty-seven asbestos manufacturers to recover damages for personal injuries sustained as a result of continued exposure to asbestos products. Twenty-six of the manufacturers settled before trial.¹⁵⁸ The remaining defendant had at most 220 employees at one time, manufactured only a small portion of all asbestos, and had a low market share of asbestos products.¹⁵⁹ At trial, the defendant attempted to introduce evidence of the plaintiff's exposure to other asbestos products.¹⁶⁰

The court held that where it has been proven that a plaintiff was exposed to asbestos while employed at a defendant's business, the defendant is precluded from showing that other companies contributed to the injury.¹⁶¹ The court cited Illinois' recognition "that there can be more than one proximate cause of an injury."¹⁶² It held, "the fact that plaintiff used a variety of asbestos products does not relieve defendant of liability for his injuries. Evidence of such exposure is not relevant."¹⁶³ The court held this rule applied even if the exposure to the defendant's products was minimal relative to exposure elsewhere.¹⁶⁴

Illinois courts have expanded this ruling. In *Kochan v. Owens-Corning Fiberglass Corporation*, an Illinois appellate court held that even if causation itself is disputed, the *Lipke* rule applies to exclude evidence of exposure to other products.¹⁶⁵ The court noted that evidence that other companies might be

longer duration. Thus, small exposures to an amphibole asbestos may cause disease, but it may take a larger dose of Chrysotile asbestos over a longer period of time to cause disease. See 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), available at http://judiciary.senate.gov/testimony.cfm?id=777&wit_id=2185 (last visited Feb. 18, 2005) ("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."). Thus, a "Chrysotile defendant" must be able to introduce the amphibole exposure to fully defend itself in court.

156. See *Leonardi v. Loyola Univ. of Chicago*, 633 N.E.2d 809, 812 (Ill. App. Ct. 1993) (rejecting the *Lipke* rule in medical malpractice cases); *Spain v. Owens Corning Fiberglass Corp.*, 710 N.E.2d 528, 534 (Ill. App. Ct. 1999) (recognizing *Leonardi's* rejection of the *Lipke* rule in medical malpractice cases).

157. *Lipke v. Celotex Corp.*, 505 N.E.2d 1213 (Ill. App. Ct. 1987).

158. *Id.* at 1215-16.

159. *Id.* at 1216.

160. *Id.* at 1221.

161. *Id.*

162. *Lipke v. Celotex Corp.*, 505 N.E.2d 1213, 1221 (Ill. App. Ct. 1987).

163. *Id.*

164. *Id.* at 1220-21.

165. *Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683, 688 (Ill. App. Ct. 1993).

responsible for the injury would “confuse the jury, with the possible result that a defendant could be unjustly relieved of liability.”¹⁶⁶

The *Kochan* Court suggested defendants would not necessarily suffer prejudice as a result of its ruling because plaintiffs themselves might introduce evidence of other exposure. The court reasoned, “if the evidence shows only a minimal exposure to defendant’s product and no other exposure to asbestos, plaintiff’s expert may look foolish testifying that such minimal exposure caused [the asbestos-related injury].”¹⁶⁷ Common sense suggests plaintiffs will not introduce this type of evidence—evidence a jury could use to hold responsible, not the lone defendant in the case, but absent parties from whom the plaintiff cannot recover. Plaintiffs may also avoid informing jurors of manufacturers or employers who may share responsibility with the defendant because such evidence would damage the plaintiff’s ability to argue for a large punitive damage award. In these cases, defendants are not allowed to give jurors all the facts they need to make an informed decision on causation, a necessary element of liability.

Other courts have properly rejected this approach. *ACandS, Inc. v. Asner* involved a nearly identical fact pattern to the Illinois cases.¹⁶⁸ Yet, in *Asner*, Maryland’s highest court overturned a trial court’s decision to exclude all evidence of asbestos exposure by third parties. The court noted its disagreement with the Illinois courts:

Whether evidence of exposure to asbestos-containing products of nonparties is relevant in products liability action against manufacturer or distributor of asbestos-containing products is controlled by purpose for which such evidence is being offered; such evidence is not per se irrelevant, and it would be rare case in which court could impose blanket ban on such evidence in advance of trial, inasmuch as evidentiary setting in which evidence would be offered ordinarily would be unknown.¹⁶⁹

The Maryland court recognized that evidence of asbestos exposure by parties other than the defendant may be relevant when the defense is “based on the negligible effect of a claimant’s exposure to the defendant’s product, or on the negligible effect of the asbestos content of a defendant’s product or both.”¹⁷⁰ If this is the defense, the court noted, “the degree of exposure to a non-party’s product may be relevant to demonstrating the non-substantial nature of the exposure to, or of the asbestos content of, the defendant’s product.”¹⁷¹

Courts should not impose outright bans on evidence of exposure to asbestos

166. *Id.* at 689.

167. *Id.*

168. *ACandS, Inc. v. Asner*, 686 A.2d 250 (Md. 1996).

169. *Id.* at 259.

170. *Id.* at 260.

171. *Id.*

by parties other than the defendant. In the proper case, jurors should be allowed to hear evidence helping them to determine the cause of the plaintiff's asbestos-related condition. Banning the jury from knowing this vital causation evidence can lead to erroneous inferences, as recognized by the United States District Court for the Northern District of Illinois:

[C]reating an inference that [plaintiff] was *only* exposed to [defendant's product] throughout his career may prejudice [defendant] as the *sole* defendant at trial. If the jury is lead [sic] to believe [plaintiff] was only exposed to [defendant's product] and that he died of an asbestos-related disease, the only logical conclusion is that [defendant's product] was a proximate cause of death. Evidence that [the plaintiff] was insufficiently exposed to [defendant's product] would be virtually unbelievable if he was only exposed to [defendant's product].¹⁷²

Thus, an outright ban on allowing the jury to hear evidence of the plaintiff's exposures to asbestos only invites prejudice and uninformed decisions into the jury box. A far better approach is to allow courts to have the discretion to admit this evidence.

Most importantly, the core of the Supreme Court of Illinois ruling in *Lipke* is out of step with both the history and logic of American tort law. The fact that there may be multiple proximate causes of an injury does not lead to exclusion of any one of them. If a drunk driver, a poorly maintained county road, and allegedly defective automobile combine to cause an accident, the plaintiff can not pick one cause and have all evidence related to the others excluded.

Some courts have fashioned rules that they deem applicable solely in asbestos cases, as in *Lipke*.¹⁷³ These decisions, which are out of step with tort law, were motivated perhaps by courts believing that they would expedite the settlement of cases. But much like the laws of unintended consequences that sometimes flow from benign ideas, these decisions have lead to a flood of unnecessary litigation. They have been discredited.¹⁷⁴

III. CONCLUSION

Asking jurors who may be deprived of key facts to determine liability and a fair damage award is like asking colorblind people to describe the exact hue of the sky before a tornado. It is likely that they will lack key facts necessary to make an informed determination. Their lack of a full understanding may potentially result in a skewed and unfair judgment.

172. See *McClain v. Anchor Packing Co.*, 1996 WL 417540, at *4 (N.D. Ill. 1996) (emphasis in original).

173. See Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

174. See *id.*

This Article provides a starting point for reconsidering and eliminating some of the hard and fast rules that hides certain evidence from the jury.¹⁷⁵ In many cases, these rules no longer make good sense in light of progressed legal principles and advanced technology. The widespread adoption of comparative negligence, the expansion of public benefits, and the increased availability of punitive damages strips the collateral source rule of its foundation. Jurors should be allowed to consider any payments received by the plaintiff for his or her injury when determining a fair damage award. Today, cars have seatbelts and their safety benefit is scientifically accepted and well understood by the public. Not allowing a jury to consider such an important fact in assessing damages, even when wearing a seatbelt might have saved a driver's or passenger's life, is surely not "the whole truth" that juries expect from the witnesses who testify before them. In the same vein are cases in which the jury is blindfolded from knowing that a driver was under the influence of alcohol or drugs, speeding, or had fallen asleep at the wheel, and then blames his or her injuries entirely on the manufacturer of the car. A jury should be allowed to consider such evidence when allocating fault. Juries should understand that when they impose joint liability on a nominally at fault defendant, that party can be required to pay the entire amount of the damages. Juries should be able to consider all of the sources of a plaintiff's exposure to asbestos or another toxic substance when determining the source of his or her injury. These are basic principles of fairness. They do not require a ruling for or against a plaintiff or defendant; they just provide juries with a more thorough understanding of facts to consider in reaching a decision.

Those who applaud the jury system should welcome the abolition of rules that hide relevant facts from their consideration. Courts should trust jurors with facts helpful to their understanding of the case. Rather than conceal these facts, it is time to pull back the shades and let the sun shine bright into the jury box. The jurors can handle it.

175. There are times when exclusion of relevant facts is right. We are not suggesting that all relevant evidence should always be presented to a jury. Obviously, privileged matters reflect a legislative and judicial judgment that some higher value trumps relevance and the evidence should be excluded, such as a client's communications to his or her lawyer. Sometimes there has been a specific legislative judgment that a jury should not hear about a rule of law, for example, that there is a damage cap in the state. Change in such a law is a legislative, policy-making decision. In other cases, the potential for bias or prejudice can call for the exclusion of relevant evidence and judges should exercise discretion under rules such as Federal Rule of Evidence 403. But in the instances discussed in this article, a blanket rule of exclusion is not satisfactory.