A Proposal for West Virginia: Admissibility of Seat Belt Evidence on the Issue of Mitigation Damages

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A PROPOSAL FOR WEST VIRGINIA:
ADMISSIBILITY OF SEAT BELT EVIDENCE ON
THE ISSUE OF MITIGATION DAMAGES

I. INTRODUCTION

Originally recognized in 1964\textsuperscript{1}, the seat belt defense has been the subject of much analysis and debate for the past two decades.\textsuperscript{2} Interestingly, the approach that the courts and the legal analysts have elected to utilize in examining the seat belt defense over the years has continually changed. This can be attributed to several factors: the context in which the seat belt defense has been raised has been varied, the way that many states have changed their legal theories on negligence, and the noticeable increase in the public awareness of the benefits of “buckling up.”\textsuperscript{3} In spite of the continuing diversified examination of the admissibility of seat belt evidence, there has yet to be a clear consensus on the issue. In the past four months two state supreme courts have issued opposite opinions on whether or not evidence of non-use of an available seat belt is admissible to reduce the plaintiff’s recovery.\textsuperscript{4} Several other states, among them West Virginia, have yet to address this issue. By examining the current social policies and theories of law and by determining the strength of the historical arguments both for and against the admission of seat belt evidence, this note will support the admission of seat belt evidence.

\textsuperscript{3} May 18 to May 22 was National All-America Buckle-Up Week sponsored by The National Highway Traffic Safety Administration. Maher, Seat-Belt Defense Gaining Validity, 10 PA. L.J. REP. 1 (May 18, 1987).
\textsuperscript{4} On April 30, 1987, the Supreme Court of Kentucky held that seat belt evidence is admissible. Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987). On July 6, 1987, the South Carolina Supreme Court held that seat belt evidence is inadmissible. Keaton v. Pearson, 358 S.E.2d 141 (S.C. 1987).
evidence to the jury on the question of mitigation of damages.\(^5\)

The seat belt defense issue raises the question of whether a defendant should be allowed to introduce evidence at trial that the plaintiff was not wearing an available seat belt and that the plaintiff's failure to buckle up was a cause of his injuries or increased their severity. The introduction of such evidence would be aimed at relieving the defendant from liability for those injuries to the plaintiff that would not have occurred had the plaintiff used an available seat belt. The courts have addressed this issue in three basic ways:

- (1) Should the evidence be admissible for establishing contributory negligence?
- (2) Should the evidence be admissible only for purposes of mitigation of damages?
- (3) Should failure to use an available seat belt be negligence per se?\(^6\)

Questions 1 and 2 have both been answered in the negative and in the affirmative by various courts. Question 3 has been consistently answered in the negative by all the courts addressing it. There is an additional approach that has been recently applied where the court does not distinguish between the applicability of seat belt evidence to the issues of mitigation of damages and of the plaintiff's negligence. This additional approach is a result of the adoption of the comparative negligence doctrine by the states. Each of these three questions and the additional approach will be analyzed in this comment.

II. WEST VIRGINIA'S POSITION

A. Common Law Duty

West Virginia's prior case history\(^7\) and legislative decisions generate little guidance in the area of seat belt use. In establishing a


\(^6\) Spier, 35 N.Y.2d at 449, 323 N.E.2d at 164, 363 N.Y.S.2d at 920.

\(^7\) West Virginia courts have dealt with the issue of non-use of an available seat belt in only one case: State v. Nester, 336 S.E.2d 187 (W. Va. 1985). The theory of the defendant was that the failure of the plaintiff to wear his seat belt was an intervening cause and the court rejected that
feasible approach for West Virginia to take on the issue of the seat belt defense, it will be important to evaluate influential factors: whether there is a common law duty in West Virginia to wear a seat belt; whether West Virginia’s child restraint law should be considered in the analysis; and whether West Virginia’s adoption of comparative negligence plays a role in this analysis.

Whichever approach a court has elected to use in its analysis of the admissibility of seat belt evidence, the most common argument against allowing seat belt evidence is the absence of a duty to wear a seat belt.\(^8\) Plaintiffs opposed to the introduction of seat belt evidence strongly urge that in the absence of a statutorily imposed duty to wear a seat belt, there exists no duty and, hence, no negligence.\(^9\) However, as early as 1967, the Supreme Court of Wisconsin concluded "that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate."\(^10\) The majority of courts have rejected the existence of a common law duty to wear seat belts because of the courts’ limited recognition of the efficacy of seat belts in general.\(^11\) Today there is less controversy about the effectiveness of seat belts. According to the National Highway Traffic Safety Administration, pertinent studies conclude that safety belts are 50 to 65 percent effective in preventing fatalities and injuries. The studies further conclude that this could mean 12,000 to 16,000 lives saved annually if all passenger car occupants used safety belts at all times.\(^12\) The public policy concerns are obvious, especially so in West Virginia, which ranks second in the nation in the rate of traffic deaths per vehicle miles.\(^13\) The argument that the public is unaware of this safety concern or simply refuses to acknowledge the effectiveness of seat belts

\(^8\) See, e.g., Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977); Clarkson v. Wright, 108 Ill. 2d 129, 483 N.E.2d 268 (1985). See also Casenote, supra note 2, at 978; Note, supra note 1, at 286.

\(^9\) Amend, 89 Wash. 2d at 132, 570 P.2d at 143; Clarkson, 108 Ill. 2d at 133, 483 N.E.2d at 270.

\(^10\) Bentzler, 34 Wis. 2d 362, 149 N.W.2d 626.

\(^11\) Peterson v. Klos, 426 F.2d 199 (5th Cir. 1970). See also Casenote, supra note 2, at 980; D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (Miss. 1971).

\(^12\) NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1985).
is seriously weakened by the fact that the majority of states now have statutes mandating the use of seat belts by passengers in vehicles.14

The federal government has been requiring for over 20 years that seat belts be installed in all passenger vehicles.15 West Virginia courts should be quick to act on the evidence that the public's perception of the use of seat belts has changed and that their increased use in our state could lead to significantly less highway fatalities.

B. West Virginia's Child Restraint Law

Of the 27 states and Puerto Rico which have mandatory seat belt laws, 23 states have enacted those laws in the past two years.16 West Virginia is silent on the issue. The West Virginia legislature has, however, spoken on the issue of child passenger restraint systems. West Virginia Code § 17C-15-4617 provides that children under

15. Id.
17. W. VA. CODE § 17C-15-46 (1986) reads as follows:
   Every driver who regularly and customarily transports a child under the age of five years in a passenger automobile, van or pickup truck other than one operated for hire, which is registered in this State shall, while such motor vehicle is in motion and operated on a public road, street, or highway of this State, provide for the protection of such child by properly placing, maintaining and securing such child in a child passenger restraining system meeting applicable federal motor vehicle safety standards in effect on the effective date [July 9, 1981] of this section, including without limitation, a car bed or a car seat meeting such standards: Provided, that if such child is between the age of three and five, a seat belt shall be sufficient to meet the requirements of this section.

   Any person who violates any provision of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten dollars nor more than twenty dollars. Penalties shall not be applied to those drivers who show reasonable proof that they have purchased a child restraint device within thirty days after violation.

   A violation of this section shall not be deemed by virtue of such violation to constitute evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages.
the age of 9 years shall be secured in a restraint system while in a
moving passenger vehicle. The statute was enacted in 1981 and re-
vised recently in 1986. The statute also provides that evidence of
failure to restrain a child is not admissible as evidence of any sort
of negligence in civil actions. It is not clear whether this statute is
applicable to the issue of whether non-use of an available seat belt
should be admitted as evidence of negligence in civil actions in-
volving only adults. In 1984, in spite of a child restraint statute
nearly identical to West Virginia's, the Florida Supreme Court de-
clared the legislature to be silent on the issue of non-use of seat
belts by adults and took the initiative to allow the evidence at civil
trials. The dissenting justice argued that since there is a statutory
bar against the admission of evidence on non-usage of statutorily
mandated child restraint devices in civil cases, it follows that evi-
dence of seat belt non-use should also be inadmissible to reduce
damages in cases involving adults.

Pennsylvania also has a child restraint system statute which pro-
vides that evidence of failure to restrain a child may not be used
in civil cases. Although the Pennsylvania Supreme Court has yet
to rule on this issue, in a recent lower court decision the following
analysis was presented:

The Child Passenger Restraint law is, of course, inapplicable to the present case.
Moreover, the policy considerations which underlie the 'Civil Actions' section of
that statute would have little application to cases involving non-infant plaintiffs.
A child under the age of four is conclusively presumed to be incapable of con-
tributory negligence. A parent pursuing civil litigation by reason of injury to a
young child would presumably be bringing the action in the interest of the child
or the child's estate.

The Pennsylvania court concluded that they need not include in their
analysis in this case, involving only adults, the child passenger re-
straint statute. The court's argument is that the child's recovery
should not be lessened due to evidence of negligence on the part of

18. Id.
20. Id. at 455 (Shaw, J., dissenting).
the parent, who is responsible for buckling the child's seat belt. After weighing many additional arguments, the court concluded that seat belt evidence is admissible.

Certainly, it is clear that the West Virginia legislature has purposefully chosen not to speak on the issue of seat belt usage by adults. The fact that the West Virginia legislature has instituted and revised legislation concerning child restraint systems but has failed to address the issue of mandatory use of seat belts by adults should not prohibit the courts of West Virginia from acting on this issue. The lack of a statutorily imposed duty means only that the behavior at issue does not establish negligence per se nor does it establish a prima facie case of negligence. 23

C. West Virginia's Adoption of Comparative Negligence

West Virginia's adoption of the doctrine of comparative negligence in 1979 24 supports the theory that a decision by the judiciary to allow the evidence of seat belt non-use would be sound law. When the seat belt defense first became an issue in the 1960's and 1970's, many states rejected its admissibility under the traditional contributory negligence rules because a finding of fault on the part of the plaintiff would bar him from any recovery. When those states which had previously rejected the defense adopted the doctrine of comparative negligence, there was much debate over whether the new legal theory should alter the admissibility of seat belt evidence. 25 In the states that have had an opportunity to re-evaluate their prior decisions, the results in subsequent cases have gone both ways. Some courts found that the adoption of comparative negligence did not alter the previous decisions about the seat belt defense. These courts held that the adoption of comparative negligence left unchanged the

24. Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979). In Bradley, West Virginia adopted the approach to negligence which says that damages should be apportioned according to the relative fault of the parties. The plaintiff's recovery is reduced by the amount of his own negligence. West Virginia adopted a modified form of comparative negligence in that the plaintiff will only be allowed to recover if his negligence is less than the negligence of the defendant.
25. Miller, supra note 2.
rule which states that an act or omission that only increases the extent of the injury without actually causing the accident is not contributory negligence.26 Still other states chose to reassess their prior rejection of the seat belt defense, recognizing that contributory negligence rested upon different policy considerations than comparative negligence.27

III. TODAY’S APPROACHES: ARGUMENTS FOR AND AGAINST THE ADMISSIBILITY OF SEAT BELT EVIDENCE

A. Contributory Negligence

The contributory negligence approach to seat belt use asserts that in failing to make use of an available seat belt, plaintiff has not complied with a standard of conduct which a reasonable prudent man would have pursued under similar circumstances and, therefore, he may be found contributorily negligent.28 During the early years of the seat belt defense controversy, states which still held the contributory negligence theory as traditionally barring recovery by a negligent plaintiff adamantly rejected this approach.29 Arguments against the contributory negligence approach included absence of a duty to wear a seat belt, the awareness that the failure to use an available seat belt did not cause the accident but merely aggravated the injuries, and the belief that this was an issue solely for the legislature to decide.30

1. Creation Based on Public Perception

Many of the arguments rejecting the admissibility of seat belt evidence as evidence of contributory negligence are obsolete. On the
issue of whether a duty to wear seat belts exists, many courts previously relied on the fact that no state legislatures had enacted statutes requiring the mandatory use of seat belts by the public. However, in the last two years, a majority of states enacted mandatory seat belt legislation. The overwhelming response by the legislatures surely demonstrates the increased public recognition of the benefits of wearing one's seat belt. A popular counter-argument is that despite the public's knowledge and acceptance of the effectiveness of safety belts, the majority of the public still decline to use them. Presently, with the introduction of a statutory mandate, seat belt usage has been increased 30 to 65 percent in several states. Some courts have refused to consider the usage rate of the public, stating the famous standard that custom is not a defense in tort law. It would not be pure speculation to advance the theory that the public's perception of the use of seat belts has changed so drastically in the past few years that failure to wear one's seat belt would now be publicly perceived as negligent.

2. Proximate Cause

Another argument which has traditionally influenced if not determined the court's decision not to allow the introduction of seat belt evidence on the issue of contributory negligence is that the failure to wear one's seat belt does not in itself cause the accident to occur, rather it increases the injuries that result. This argument was the basis of the decisions in both Florida and New York in 1974, to only allow the evidence of seat belt non-use exclusively for the issue of mitigation of damages. To the contrary, many other states have held that the causal connection between the non-use of

31. Amend, 89 Wash. 2d at 132, 570 P.2d at 143; Smith, 600 F. Supp. at 1563. See also Note, supra note 1, at 286.
32. See supra note 14.
33. See Miller, supra note 2, at 69.
35. Smith, 600 F. Supp. at 1565.
36. Id.
37. Spier, 35 N.Y.2d at 449, 323 N.E.2d at 167, 363 N.Y.S.2d at 921; Pasakarnis, 451 So.2d at 453.
an available seat belt and the plaintiff's injuries would be sufficient
to establish contributory negligence by the plaintiff. 38

Kentucky recently struggled with this question of proximate cause
in its decision to allow evidence of seat belt non-use to be considered
by the jury on the issue of contributory fault. 39 In its decision in
Wemyss v. Coleman, 40 the Kentucky Supreme Court was guided by
the standards set forth in the Uniform Comparative Fault Act
(UCFA) from which it had extracted its formula for determining
comparative negligence. 41 The Kentucky decision pointed out that
under the UCFA, the definition of fault includes "the unreasonable
failure to avoid an injury or to mitigate damages." 42 The Kentucky
court then concluded that failure to wear one's seat belt fell into
the category of fault defined by "unreasonable failure to avoid in-
jury." 43

The West Virginia Supreme Court spoke of this issue in their
adoption of the doctrine of comparative negligence. The court spe-
cifically explained that before contributory fault or negligence can
be counted, it must be found to be a proximate cause of the plain-
tiff's injuries. 44

3. A Potential Battle of Experts

Whether or not the failure of the plaintiff to wear an available
seat belt was a cause of his injuries has raised another argument
supporting the rejection of the seat belt defense. Many courts have
found and plaintiffs have argued that the admission of seat belt
evidence would cause an expensive battle of experts and that the
juries are not capable of deciding such complex issues. 45 However,
one law review commentator succinctly stated, "[r]equiring expert
testimony is not uncommon in our courts and should not stand as the reason for rejecting the seat belt defense. Adequate safeguards are maintained by the trial judge who has the discretion to limit expert testimony if it is irrelevant or cumulative.\footnote{46} The fact that juries often have to decide complex issues is obvious and it should not be asserted that the issue of non-use of seat belts will bring forth a new level of complexity.

4. Outdated Arguments

There are additional arguments which have been cited in opposition to the seat belt defense, but they are now outdated. One example is that since not all automobiles are required to have seat belts available, the plaintiff who does not have a seatbelt available to him will be in a better position to recover for the total amount of his injuries.\footnote{47} The government has been requiring the installation of seat belts in automobiles for 20 years.\footnote{48} Under the circumstances, it appears safe to say that most automobiles that are still operational and used routinely will be equipped with the safety devices. A similar argument is that the public has well founded fears of wearing seat belts because seat belts can worsen some accident situations and actually cause accidents.\footnote{49} These fears are now known to be unfounded.\footnote{50} These now outdated arguments exemplify the fact that the analysis of the seat belt defense must continually be updated to reflect the advancement of technology and the increases in public knowledge and awareness.

5. Absence of a Legislatively Created Duty

A frequently stated argument asserted by plaintiffs against the seat belt defense is that since courts should interpret law and not make law, they should only admit seat belt evidence if the legislature has imposed a duty on the ordinary person to wear a seat belt. In

\footnote{46}{See Casenote, supra note 2, at 991.}
\footnote{47}{See Miller, supra note 2, at 70.}
\footnote{49}{Spier, 35 N.Y.2d at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 922.}
\footnote{50}{Id.}
1984, the Florida Supreme Court responded to that assertion with the following: "In the past, this court has not abdicated its continuing responsibility to the citizens of this state to ensure that the law remains both fair and realistic as society and technology change."¹⁵¹ Quite contrary to this was the very recent decision of the Supreme Court of South Carolina in Keaton v. Pearson¹⁵² where the court held that seat belt evidence is inadmissible.¹⁵³ Based, for the most part, on judicial deference, the court held that there was no duty to wear seat belts in the absence of a statutory mandate.¹⁵⁴

B. Mitigation of Damages

In its 1984 decision, Insurance Co. of North America v. Pasakarnis,⁵⁵ the Florida Supreme Court, following the New York decision of Spier v. Barker,⁵⁶ decided that evidence of seat belt use should be admitted only for consideration of mitigation of damages and not as evidence of contributory negligence.

In accordance with similar decisions in New York and Florida, the United States District Court predicted in Wilson v. Volkswagen of Am.,⁵⁷ that the Virginia state law would allow the introduction of evidence of non-use of available seat belts for consideration on the issue of mitigation of damages.⁵⁸ The federal court relied heavily on Spier v. Barker.⁵⁹

This is the most popular approach to the seat belt defense in modified comparative negligence states. The mitigation theory rests on the idea that the defendant is only responsible for those damages which he proximately caused. In this context, the duty that is imposed upon the plaintiff is spoken of in terms of duty to exercise due care in preventing injuries to one's self. The question is did the

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⁵¹ Pasakarnis, 451 So. 2d at 451.
⁵² Keaton, 358 S.E.2d 141.
⁵³ Id.
⁵⁴ Id.
⁵⁵ Pasakarnis, 451 So. 2d 447.
⁵⁸ Id.
⁵⁹ Id.
plaintiff act unreasonably and in disregard of his own best interests.\textsuperscript{60} The mitigation approach appears to be a middle ground between the harshness that could result from traditional contributory negligence and not allowing the defense at all. Two theories of traditional tort law provide a basis for the mitigation of damages theory: (1) plaintiff’s duty to mitigate damages, and (2) the doctrine of avoidable consequences.\textsuperscript{61}

1. Post Accident Conduct

Most of the issues that have been reviewed with regard to the contributory negligence approach are also applicable with regard to the mitigation of damages approach. Opponents of the seat belt defense also argue that the doctrine of avoidable consequences and the plaintiff’s duty to mitigate damages are only applicable to post-accident conduct.\textsuperscript{62} In \textit{Spier}, the court suggested that the effort required to buckle a seat belt prior to an accident is far outweighed by the benefit of that act.

\textit{[T]he seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages prior to the accident. Highway safety has become a national concern; we are told to drive defensively and to 'watch out for the other driver.' When an automobile occupant may readily protect himself, at least partially, from the consequences of a collision, we think that the burden of buckling an available seat belt may, under the facts of the particular case, be found by the jury to be less than the likelihood of injury when multiplied by its accompanying severity.}\textsuperscript{63}

The ability to so easily protect one’s self from possible danger by simply buckling an available seat belt is obviously a unique opportunity for the potential plaintiff. A reasonable person in our society will recognize the dangers involved in automobile transportation and will conclude that the risks of being involved in an accident far outweigh the burden of buckling up. The explanation that Dean Prosser offers on this subject is interesting:

\textsuperscript{60} See generally, \textit{Pasakarnis}, 451 So. 2d 447 (Shaw, J., dissenting).

\textsuperscript{61} See generally \textit{Spier}, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916. See also, Miller, \textit{supra} note 2.

\textsuperscript{62} See \textit{supra} note 2.

\textsuperscript{63} \textit{Spier}, 35 N.Y.2d at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 922.
Closely allied to the doctrine of contributory negligence is the rule of ‘avoidable consequences,’ which denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. Both rest upon the same fundamental policy of making recovery depend upon the plaintiff’s proper care for the protection of his own interests, and both require of him only the standard of the reasonable man under the circumstances.64

Despite this analysis, some defendants would argue that if the evidence of non-use of an available seat belt cannot be admitted to show contributory negligence, then neither should it be admitted to reduce plaintiff’s recovery under a mitigation of damages theory.65

2. Duty To Anticipate Negligence

In support of their rejection of the admissibility of seat belt evidence on a mitigation theory, many courts also argue that it is unjust and against traditional tort law theory to impose upon a plaintiff the duty to anticipate the negligence of others.66 Furthermore, reliance on a pre-accident avoidable consequences theory and/or pre-accident mitigation of damages theory results in denying the plaintiff the traditional right to assume that others will exercise due care.67 Counter-arguments include returning to the change in the public’s knowledge and awareness of the effectiveness of seat belts and of the existence of dangers of driving without wearing them. If the public is aware of the danger involved in driving without a seat belt, then the right to assume that others will exercise due care is diminished if not eliminated.68

3. Negligence Per Se.

It is the recent adoption of mandatory seat belt laws by a majority of states69 that leads us to the conclusion that public awareness of the importance of safety devices is increasing. It is this same legislation that creates the question of whether non-use of an avail-

64. Clarkson, 108 Ill. 2d at 132, 483 N.E. 2d at 269 (quoting W. Prosser, Torts § 65, at 422-23 (4th ed. 1971)).
67. See Casenote, supra note 2, at 986-88.
68. Id.
69. See supra note 14.
able seat belt should be negligence per se in jurisdictions which have the mandatory statutes. Because so many of the states have only very recently enacted this legislation, this is a question that has not been thoroughly considered. One important consideration involved is the fact that a number of the statutes on mandatory seat belt use contain a provision stating that evidence of non-use of a seat belt cannot be used in civil cases. At least one justice has questioned the constitutionality of such a provision.\(^\text{70}\)

4. Equitable Standard

Negligence per se, the third approach that the courts have taken when considering the seat belt defense, has been overwhelmingly rejected by all the jurisdictions considering it.\(^\text{71}\) As has already been noted, most of those decisions were in jurisdictions without a mandatory seat belt law.\(^\text{72}\) Before mandatory seat belt statutes became popular, defendants who sought to admit seat belt evidence to establish that the plaintiff was negligent per se relied on statutes requiring the installation of seat belts only.\(^\text{73}\) The Supreme Court of Wisconsin considered the question of negligence per se under a Wisconsin statute which only required that automobiles be *equipped* with seat belts:

> While we agree with those courts that have concluded that it is not negligent *per se* to fail to use seat belts where the only statutory standard is one that requires the installation of the seat belts in the vehicle, we nevertheless conclude that there is a duty, based on the common-law standard of ordinary care, to use available seat belts independent of any statutory mandate.\(^\text{74}\)

The common-law duty of ordinary care that the Wisconsin Supreme Court would impose is based on what an ordinary prudent person in similar circumstances would do. It would seem that this remains

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70. Clarkson, 108 Ill. 2d at 139-40, 483 N.E.2d at 273 (Ryan, J., dissenting).
72. Most states have enacted their mandatory seat belt legislation in the past two years, see supra note 14.
73. Miller, 273 N.C. at 233-34, 160 S.E.2d at 68; Bentzler, 34 Wis. 2d at 385, 142 N.W.2d at 639. See Casenote, supra note 2, at 982.
74. Bentzler, 34 Wis. 2d at 385, 142 N.W.2d at 639.
the most equitable standard to impose upon the public even when the jurisdiction is one with a mandatory seat belt law. The question is not whether the court should impose a standard of conduct upon all persons riding in vehicles equipped with seat belts. The question is rather whether a reasonable person, considering the possibilities of being in an automobile accident, would choose to fasten seat belts to prevent or reduce injury to himself. The negligence per se approach is lacking support in all jurisdictions and one important reason is that it is a well accepted fact that despite the increase in public acceptance of the seat belt, a large portion of the public still declines to use them.75

5. Causal Relationship

Another reason to reject the negligence per se standard is that whether a plaintiff was wearing his or her seat belt would only be consequential if there is sufficient evidence to show a causal relationship between the plaintiff's failure to wear an available seat belt and his or her resulting injuries. This would be true no matter which of the three approaches to the seat belt defense the court chooses to pursue. The majority of the decisions accepting the seat belt defense by either of the first two approaches includes the condition that, in order for the question to get to the jury, it must first be shown that there is sufficient evidence to show a causal relationship between the failure to use an available seat belt and the resulting injuries.76 The purpose of this condition upon which the introduction of seat belt evidence is premised is to avoid jury confusion and to restrict the introduction of irrelevant evidence.

6. West Virginia's Approach

In West Virginia, the negligence per se approach would not be accepted because it is well settled law in West Virginia that "the violation of a statute is only prima facie evidence of negligence, not

75. Despite evidence of increasing usage rates, overall usage rates remain low. See Casenote, supra note 2, at 980-81.

76. See, e.g., Wemyss, 729 S.W.2d at 179; Pasakarnis, 451 So. 2d at 454.
negligence per se." Prima facie evidence creates a presumption that can be rebutted. Even if the West Virginia legislature adopted a mandatory seat belt law, violation of that law would not be considered negligence per se.

7. A Fourth Approach

There is yet a fourth approach to the seat belt defense that is utilized less frequently than the previous three and is only applicable in those jurisdictions that have adopted the pure form of comparative negligence. Discussed as early as 1980 in a law review comment, this approach was the basis for the recent Supreme Court of Kentucky decision in *Wemyss v. Coleman*. The court in *Wemyss* held that evidence of seat belt non-use is admissible without specifying whether it should be offered on the issue of mitigation of damages or of contributory negligence.

The approach simply eliminates the distinction between whether the seat belt evidence is applied to the issue of contributory negligence or whether it should be applied to the issue of mitigation of damages. The adoption of a pure comparative negligence doctrine eliminates the need for such a distinction. Because West Virginia has adopted a modified version of comparative negligence, this approach would not lead to equitable results.

The idea of no longer separating the issues of contributory negligence and mitigation of damages originates in the knowledge that the two were originally distinguished from one another to eliminate the harsh results that would occur if a plaintiff was found negligent under the traditional contributory negligence law. The avoidable consequences and mitigation of damages doctrines were the basis for the mitigation of damages approach to the seat belt defense and were principles applied in jurisdictions where the plaintiff’s contributory negligence was a complete bar to recovery, thus allowing the courts to fairly separate damages attributable to the plaintiff’s
behavior and still allow the plaintiff partial recovery. "Under comparative negligence, there is no longer a need or reason to define artificial lines or times beyond which the court cannot consider the doctrines of avoidable consequences or mitigation of damages as a means of equitably apportioning damages." 

Recently, a United States District Court, applying Vermont law, used the fourth approach to decide to allow seat belt evidence to be considered by the jury. In its decision, the court stated, "[t]he non-use of his seat belt goes not only to the issue of whether the plaintiff acted negligently, but also to the degree to which any negligence found might have contributed to the injuries he sustained." The court held "that evidence concerning the non-use of a seat belt may be considered by the jury." This was the same kind of unqualified admissibility that the Kentucky courts have allowed.

It has been concluded that two reasons limit this approach to the seat belt defense to only states that have adopted pure comparative negligence: (1) there would be confusion as to how the jury should be instructed to interpret the modified comparative negligence doctrine; and (2) the plaintiff could still be barred from recovery if he was found to be more than 49 percent negligent. In a modified comparative negligence state, the negligent defendant could conceivably be relieved of any responsibilities for the damages that he caused, merely because the plaintiff's failure to wear a seat belt aggravated the injuries.

IV. CONCLUSION

The issues explored with regard to the contributory negligence approach are also applicable to the mitigation of damages approach. After analyzing those issues it appears that if West Virginia had adopted a pure form of comparative negligence, seat belt evidence

80. See generally Miller, supra note 2. See also Madaris, 80 Or. App. 662, 723 P.2d 1054.
81. Clarkson, 108 Ill.2d at 137-38, 438 N.E.2d at 272.
82. Smith, 600 F. Supp. 1561.
83. Id. at 1565.
84. Id. at 1564.
85. Wemyss, 729 S.W.2d at 179.
86. See Note, supra note 1, at 277.
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could have been admissible in this state on both contributory negligence and mitigation of damages. This not being the case, West Virginia’s adoption of the seat belt defense should be limited to issues involving the mitigation of damages only.

It is evident that the appropriate analysis of the admissibility of seat belt evidence has changed much over the past 23 years. The increased public awareness of the effectiveness and necessity of seat belts, evidenced by the recent adoption of mandatory seat belt laws by a majority of states, plays an important role in this analysis in 1987. Many of the historical arguments against the admission of seat belt evidence are now outdated and unfounded.

The most equitable conclusion is that West Virginia courts should allow the jury to decide whether the plaintiff has breached his or her duty to exercise reasonable care for his or her own safety and to use this information in their deliberations on damages. Under the traditional mitigation of damages approach which was adopted in Spier v. Barker87 West Virginia should only allow the evidence of seat belt non-use to be considered on the issue of negligence, if there is competent evidence that failure to wear a seat belt actually caused the accident in question.88

The mitigation of damages approach would compliment West Virginia’s theory of comparative negligence, as the plaintiff would be prevented from recovering damages for those injuries which were attributable to his or her own negligence. The approach would also reflect an increased public awareness of the effectiveness and necessity of seat belt use.

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88. This approach would also follow New York’s approach. See Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982).