

## Toward a Rational Seat Belt Policy in Kansas\*

### I. INTRODUCTION

Former Kansas City Chiefs linebacker Derrick Thomas and New Jersey Governor Jon Corzine share important characteristics: both were injured in automobile accidents when they were not wearing seat belts. Both men's failure to buckle up defied mandatory seat belt laws enacted by the states in which their accidents occurred. Both men's non-use of seat belts were highly publicized in the news media. But under Kansas law, whether a jury could hear evidence of either man's seat belt use would turn on the type of tort claim he brought.

Jurors in a 2004 product liability suit brought in Missouri by Derrick Thomas's family against General Motors heard all about Thomas's not wearing a seat belt. Thomas was killed on January 23, 2000 when the Chevrolet Suburban he was driving rolled over and he was ejected.<sup>1</sup> In their suit against General Motors, Thomas's family alleged the Suburban's defective roof design caused Thomas's death.<sup>2</sup> At trial, attorneys for General Motors argued, to a defense verdict, that Thomas's injuries were due to Thomas's speeding and failure to wear a seat belt, not to a design defect.<sup>3</sup> The seat belt evidence was thought to have played a decisive role in the jurors' verdict.<sup>4</sup> Counsel for Thomas's family attributed the defense verdict to the intense attention paid to Thomas's not wearing his seat belt.<sup>5</sup> If Thomas's family had brought their suit in Kansas, the jury could have considered this important piece

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1. Bill Vlasic, *GM Not Liable for Player's Death in Crash, Jury Rules*, U.S.A. TODAY, Aug. 17, 2004, available at [http://www.usatoday.com/sports/football/nfl/2004-08-17-thomas-gm\\_x.htm](http://www.usatoday.com/sports/football/nfl/2004-08-17-thomas-gm_x.htm).

2. *Id.*

3. GM Wins in Derrick Thomas Wrongful Death Trial, KMBC, Aug. 17, 2004, <http://www.thekansascitychannel.com/news/3660399/detail.html> (last visited Apr. 20, 2008).

4. *Id.*

5. *Id.*

of evidence in deciding the design defect claim, but not in determining damages.

In a highly publicized incident in April 2007, New Jersey Governor Jon Corzine suffered severe injuries in an accident in which he, a passenger, was not wearing a seat belt.<sup>6</sup> After the accident, Corzine attempted to atone publicly for his failure to buckle up. He voluntarily paid a fine for violating New Jersey's seat belt law, which requires front seat passengers to wear seat belts.<sup>7</sup> Corzine, in conjunction with the National Highway Transportation Safety Administration (NHTSA), also released a public service announcement to promote seat belt use in advance of Memorial Day weekend in May 2007.<sup>8</sup> If Corzine's accident had occurred in Kansas and he had brought a negligence suit,<sup>9</sup> a jury could not have considered Corzine's failure to wear a seat belt when determining whether he was comparatively negligent or when calculating his damages, notwithstanding the high degree of public attention his omission had already received.

As these two anecdotes suggest, failure to use a seat belt is by now a well-known contributor to the severity of injuries sustained in motor vehicle accidents. The NHTSA has spent considerable funds and devoted significant attention to its "Click It or Ticket" campaign to promote seat belt use. According to the NHTSA, the campaign has been hugely successful and now ranks as "the most successful seat belt enforcement campaign ever."<sup>10</sup> The "Click It or Ticket" campaign has generated a national seat belt usage rate of 82%, the highest in American history.<sup>11</sup> Despite overwhelming awareness and widespread use of seat belts, Kansas statutes still preclude juries from considering seat belt non-use when comparing negligence and evaluating the damage mitigation defense.

In this Note, I will argue that Kansas should amend its statutes to allow juries to consider evidence of seat belt and child safety seat non-use when determining comparative fault. In Part II, I will trace the evolution of Kansas statutes relevant to seat belt use, including Kansas's

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6. *Governor Apparently Wasn't Wearing Seat Belt During Crash*, CHI. TRIB., Apr. 14, 2007, at 6.

7. CBS/AP, *New Jersey Governor: "I Should Be Dead,"* May 24, 2007, <http://www.cbsnews.com/stories/2007/05/24/national/main2845516.shtml> (last visited Apr. 20, 2008).

8. *Id.*

9. Governor Corzine has not brought suit in Kansas or any other state, and there is, to the author's knowledge, no allegation that his driver actually was negligent.

10. "Click It or Ticket," Campaign Headquarters, <http://www.nhtsa.gov/portal/site/nhtsa/menuitem.cda13865569778598fcb6010dba046a0> (last visited Apr. 20, 2008).

11. *Id.*

comparative fault, seat belt installation and use, and child safety seat statutes. I will also discuss Kansas courts' interpretation of those statutes, focusing on the seminal case *Hampton v. State Highway Commission*. In Part III, I will argue that Kansas's exclusion of evidence of seat belt non-use is derived largely from obsolete concerns. This exclusion also is contrary to the rationale underlying Kansas's comparative fault system and to Kansas law governing the admissibility of other traffic offenses. Setting aside evidentiary uses unique to product liability causes of action, I suggest there is only the thinnest basis for treating the use of seat belt evidence differently in a simple negligence rather than a product liability context. I will also discuss the trends in other states toward admitting seat belt evidence, and suggest that recent actions by Kansas legislators demonstrate the time may be ripe for Kansas to amend its laws further to encourage seat belt use. Specifically, Kansas should amend its statutes to allow evidence of seat belt non-use as part of a two-step comparative fault analysis.

## II. BACKGROUND

Although Kansas statutes pertinent to seat belt use have evolved over time, Kansas courts' attitudes toward the admissibility of seat belt evidence have not. Passage of comparative fault and mandatory seat belt use statutes has not altered the rule that seat belt evidence is inadmissible to show comparative fault or mitigate damages, but is admissible for any other purpose.

### A. *Statutory Foundations of Kansas's Current Seat Belt Policy*

#### 1. Comparative Fault

In 1974, Kansas followed the trend among a majority of states and adopted a comparative fault system of tort recovery. Kansas's comparative fault statute, effective July 1974, supplanted its earlier contributory negligence system, which completely barred recovery to any plaintiff whose negligence was held to have played a role in his injury. The Kansas comparative fault statute provides that:

[t]he contributory negligence of any party in a civil action shall not bar such party . . . from recovering damages for negligence resulting in death, personal injury, property damage, or economic loss, if such

party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made.<sup>12</sup>

In other words, a plaintiff in Kansas courts can recover tort damages as long as the defendant is at least 51% at fault for the plaintiff's injuries.<sup>13</sup>

By passing comparative fault legislation, the Kansas Legislature recognized that a plaintiff's own fault is relevant to the damages that a plaintiff should be allowed to recover for non-intentional torts. Kansas courts recognize that the comparative fault statute reflects the Kansas Legislature's intent "to equate recovery and duty to pay to degree of fault."<sup>14</sup> The statute mandates that tort damages be determined in proportion to the negligence attributed to each party.<sup>15</sup> Although the statutory language is phrased in terms of "negligence," it has been interpreted more broadly to apply to any less-than-intentional wrongdoing.<sup>16</sup>

## 2. Vehicle Safety Restraint Installation and Use Requirements

In the early 1970s, concerns about automobile-related injuries led the federal government to adopt vehicle safety standards. In 1971, the federal government enacted Federal Motor Vehicle Safety Standards, which specified the minimum occupant crash protection measures automobile manufacturers had to undertake.<sup>17</sup> The Standards required that American automobiles manufactured on and after January 1972 be equipped with occupant restraints in compliance with stated specifications.<sup>18</sup> The stated purpose for the Standards was "to reduce the number of deaths of vehicle occupants, and the severity of injuries . . . by specifying equipment requirements for active and passive restraint systems."<sup>19</sup> The language of the Standards implicitly assumed that

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12. KAN. STAT. ANN. § 60-258a (2005).

13. See William E. Westerbeke & Stephen R. McAllister, *Survey of Kansas Tort Law: Part I*, 49 U. KAN. L. REV. 1037, 1122-23 (2001) (referring to Kansas's version of comparative fault as a "forty-nine percent rule").

14. *Brown v. Keill*, 580 P.2d 867, 873-74 (Kan. 1978).

15. § 60-258a.

16. See Westerbeke & McAllister, *supra* note 13, at 1123 (noting that Kansas courts interpret the comparative fault statute to "encompass virtually all forms of fault that are less culpable than intentional wrongdoing").

17. 49 C.F.R. § 571.208 (2007).

18. *Id.* § 571.208 S4.1.1.

19. *Id.* § 571.208 S2.

installation of seat belts and other restraints in vehicles would further its stated public safety goal.

Kansas law mandating seat belt installation tracked the federal requirements. In 1974, Kansas passed a statute that required manufacturers to install seat belts in passenger vehicles.<sup>20</sup> The statute required that automobile manufacturers provide lap safety belts for all seating positions in non-law enforcement passenger vehicles manufactured in January 1968 or later.<sup>21</sup> Manufacturers were required to provide shoulder harness belts in addition to lap belts for the front seating positions.<sup>22</sup> Despite requiring manufacturers to make seat belts available in passenger vehicles, the Kansas statute did not mandate that motorists use the seat belts.<sup>23</sup>

Kansas's first mandate requiring use of a vehicle restraint system applied only to children. In 1981, the Kansas Legislature passed a statute requiring children younger than four years old, and children aged four through eight who weighed less than a threshold weight, to ride in approved child safety seats.<sup>24</sup> The statute requires children aged eight to fourteen, as well as children aged four through eight who exceed the threshold weight, to wear seat belts.<sup>25</sup> Failure to secure a child occupant properly is a primary enforcement offense, such that law enforcement officers can stop a driver for violating the child safety seat statute without another justification for the stop.<sup>26</sup>

In 1986, Kansas enacted a statute requiring most non-child vehicle occupants to utilize seat belts.<sup>27</sup> The strictness of the law and the ease of its enforcement vary by the passenger's age and location within the vehicle. Adult occupants (age eighteen or older) in front seating positions must wear seat belts while the vehicle is in motion.<sup>28</sup> By implication, adult passengers in rear seats are free to ignore seat belts. The statute specifies secondary enforcement of the mandatory seat belt law for violations by adult passengers. Law enforcement officers may

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20. KAN. STAT. ANN. § 8-1749 (2001).

21. § 8-1749(b). The statute specified less stringent requirements to automobiles manufactured between January 1965 and January 1967. Vehicles manufactured in that period had to be equipped with at least two lap belt assemblies for the front seating positions. *Id.* § 8-1749(a). It appears the statute required vehicles manufactured after 1965 but before the statute was passed be retrofitted with safety belt assemblies in compliance with the statute.

22. § 8-1749(c).

23. *See* § 8-1749 (noting car requirements, but not use requirements).

24. § 8-1344(a) (Supp. 2006).

25. *Id.*

26. 23 Kan. Op. Att'y Gen. No. 89-104 (1989), 1989 WL 455544.

27. § 8-2503.

28. § 8-2503(a).

only issue citations for an adult's violation of the statute if they have an independent cause to stop the vehicle.<sup>29</sup> Since January 2008, failure to comply with the mandatory seat belt statute has resulted in a \$60 fine.<sup>30</sup>

Both the requirements and the enforcement of Kansas's mandatory seat belt law are more stringent with respect to vehicle occupants younger than eighteen years old. Individuals under eighteen must ride either belted in or in a child safety restraint (depending on their age and weight) in any seating position when the vehicle is in motion.<sup>31</sup> In addition, in 2007 the Kansas Legislature amended its enforcement provisions to allow primary enforcement of seat belt violations by persons younger than eighteen, effective July 2007.<sup>32</sup>

### 3. Admissibility of Evidence of Seat Belt Non-Use

Regardless of age or seating position, failure to use an available seat belt is inadmissible in Kansas courts for the purposes of determining comparative fault or mitigating damages. As originally passed in 1986, Kansas's mandatory seat belt statute states that "[e]vidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages."<sup>33</sup> In 1989, the Kansas Legislature amended its statute on child safety restraints to include inadmissibility language that mirrors the language in the mandatory seat belt law.<sup>34</sup> A federal court applying Kansas law interpreted this language to mean that seat belt use is inadmissible only for the two stated purposes, and therefore can be considered if offered for any other purpose, including to defend against a product liability claim.<sup>35</sup> Because comparative fault and damages mitigation are the primary reasons a personal injury defendant would refer to a plaintiff's seat belt non-use, the statute in effect precludes most

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29. § 8-2503(f).

30. § 8-2504(a)(3). From the time the law was passed until December 31, 2007, violators received only a warning for seat belt violations. § 8-2504(a)(1).

31. § 8-2503(b).

32. House, Senate Pass Primary Seat Belt Law for Teenagers, KHI News Serv., Apr. 4, 2007, <http://www.khi.org/s/index.cfm?aid=508> (last visited Apr. 20, 2008).

33. § 8-2504(c).

34. § 8-1345(d). The 1989 amendment reversed the position taken previously by a federal court applying Kansas law. In *Barnes v. Robinson*, the court held that the plaintiff's failure to secure his son in a safety seat was admissible for the purposes of comparative negligence and damages mitigation. 712 F. Supp. 873, 876 (D. Kan. 1989).

35. See, e.g., *Gardner ex rel. Gardner v. Chrysler Corp.*, 89 F.3d 729, 736 (10th Cir. 1996) (applying Kansas law) (holding that the prohibition in § 8-2504(c) applies only when the seat belt evidence is offered to show comparative fault or to mitigate damages, and does not apply when the evidence is offered for another purpose).

personal injury defendants from bringing into evidence a plaintiff's decision not to wear a seat belt.

Although evidence of a plaintiff's failure to buckle up seems likely to reduce the plaintiff's recovery, regardless of whether it is admitted under a comparative fault or damage mitigation theory, there are fundamental differences between the two approaches. If seat belt evidence were admitted to show comparative fault, a jury would factor a plaintiff's omission into its overall allocation of fault for the accident's aftermath and calculate damages accordingly.<sup>36</sup> Damage mitigation, on the other hand, is an affirmative defense that arises when a plaintiff's conduct did not contribute to the occurrence of the accident but did increase the resulting damages.<sup>37</sup> If seat belt evidence were admitted to mitigate damages, plaintiffs would be barred from recovering the damages that would have been avoided had they worn seat belts.<sup>38</sup>

### *B. Common Law Interpretation of Seat Belt Statutes*

#### 1. Pre-Comparative Fault Arguments Against Seat Belt Evidence

Before comparative fault statutes became prevalent, arguments against admitting evidence of seat belt non-use as evidence of contributory negligence turned on the idea that admitting such evidence would be unfairly harsh to injured plaintiffs. If seat belt evidence were admissible to show fault in a contributory negligence system, a plaintiff who did not buckle up would be completely barred from recovery, even though his failure to wear a seat belt did not cause the accident.<sup>39</sup> Critics of seat belt evidence feared this inequity would be compounded by the fact that many fewer people wore seat belts in the pre-comparative fault era, when seat belts in vehicles were something of a novelty. At the time, a majority of plaintiffs injured in automobile accidents would have been denied recovery if their failure to wear seat belts had been considered. "Kansas courts refused to shift fault to the non-wearer for

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36. Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 326 (1986).

37. *Cox v. Lesko*, 953 P.2d 1033, 1040 (Kan. 1998) (citing 22 AM. JUR. 2D *Damages* § 497).

38. *Id.*

39. See Brett R. Carter, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 218-19 (1998) (noting "defendants attempted to use the seat belt defense as a complete bar to a plaintiff's recovery by showing that the plaintiff was contributorily negligent for not buckling up").

fear that an insurer might try to evade coverage under a policy or to prevent actual wrongdoers from avoiding liability.”<sup>40</sup>

Early arguments against admitting seat belt non-use to mitigate damages were based on the idea that seat belt use did not fit easily into the theoretical underpinnings of damage mitigation. Damage mitigation theory requires a plaintiff to take reasonable steps to mitigate his damages after those damages have occurred.<sup>41</sup> Because seat belt use, by definition, must take place before any damages occur, opponents of seat belt non-use evidence in the context of damage mitigation argued its admission would place an unfair obligation on the plaintiff to anticipate other drivers’ negligence.<sup>42</sup>

## 2. *Hampton v. State Highway Commission*

In 1972, the Kansas Supreme Court addressed these general concerns in *Hampton v. State Highway Commission*, which pre-dates the passage of comparative fault in Kansas. In *Hampton*, Kansas courts addressed for the first time the evidentiary value of a plaintiff’s failure to use available seat belts.<sup>43</sup> Plaintiff Hampton lost control of his car and was ejected when he drove through standing water on the highway.<sup>44</sup> He brought a negligence action against the Kansas Highway Commission, alleging the highway’s defective design caused his injuries.<sup>45</sup> The Highway Commission sought to introduce evidence that the plaintiff was not wearing his seat belt to demonstrate the plaintiff’s contributory negligence and to mitigate his damages.<sup>46</sup> The Kansas Supreme Court affirmed the trial court’s exclusion of the evidence of the plaintiff’s failure to buckle up.<sup>47</sup>

In its opinion in *Hampton*, which has been cited by many Kansas cases discussing the admissibility of seat belt evidence, the court set out the arguments against admitting evidence of seat belt non-use in the contexts of both contributory negligence and mitigation of damages.

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40. *Gardner*, 89 F.3d at 733.

41. Carter, *supra* note 39, at 219.

42. *See id.* (“reasoning that the seat belt defense did not fall under the rule of avoidable consequences”).

43. *Hampton v. State Highway Comm’n*, 498 P.2d 236 (Kan. 1972), *superseded by statute on other grounds*, Kansas Tort Claims Act, KAN. STAT. ANN. § 75-6101 through 6115, *as recognized in* Force v. City of Lawrence, 838 P.2d 896, 900 (Kan. Ct. App. 1992).

44. *Id.* at 241.

45. *Id.* at 242.

46. *Id.* at 248.

47. *Id.* at 249.



First, the court reasoned that the evidence should not be admissible because the plaintiff had no legal duty to wear his seat belt.<sup>48</sup> Although at the time of the decision Kansas required that seat belts be available in passenger vehicles, it had not yet mandated their use, so the plaintiff's behavior violated no statutory duty.<sup>49</sup> Second, the court also could not justify admitting the evidence based on a common law duty to protect one's own safety, because it saw no evidence suggesting that the plaintiff's failure to buckle up constituted a departure from a reasonable man's behavior.<sup>50</sup> The court explained, "[w]e have nothing before us on which we could confidently base a finding that the accepted community standard of care requires one to buckle up routinely; experience dictates to the contrary."<sup>51</sup> Third, the court was loathe to impose liability on the choice not to wear seat belts while considerable uncertainty existed as to the effectiveness of seat belts and their relative benefits over being able to exit the vehicle more easily.<sup>52</sup> Finally, the court held that seat belt non-use should not be admissible to mitigate damages because individuals are not required to anticipate and affirmatively guard against the negligence of others.<sup>53</sup> The court observed, however, that a person "must use reasonable diligence to mitigate one's damages once the risk is known."<sup>54</sup>

Kansas courts continued to apply the *Hampton* reasoning in more recently decided cases involving seat belt evidence, even though *Hampton* was handed down before the passage of comparative fault and before Kansas mandated seat belt use. For example, in 1981 the Kansas Court of Appeals in *Taplin v. Clark* held that the passage of comparative fault did not require the abandonment of the *Hampton* rule.<sup>55</sup> In its 1989 decision *Watkins v. Hartsock*, the Kansas Supreme Court referred to the *Hampton* court's position that individuals need not guard against others' negligent acts.<sup>56</sup> In addition, the *Hampton* holding was essentially codified in section 8-2504(c) of the Kansas Statutes, which prohibits admission of seat belt evidence to show comparative fault or mitigate

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See id.* (recognizing that "[s]ome people . . . deliberately refuse to wear seat belts for fear of aggravating an injury or being trapped in a collision").

53. *Id.*

54. *Id.* (citing *Atkinson v. Kirkpatrick*, 135 P. 579, 581 (Kan. 1913)).

55. 626 P.2d 1198, 1201 (Kan. Ct. App. 1981).

56. 783 P.2d 1293, 1299 (Kan. 1989).

damages. *Hampton* remains the rule despite changes in the times and in the law.

### 3. Admissibility for All Other Purposes

Kansas courts consistently admit evidence of seat belt non-use for all purposes other than demonstrating comparative fault or mitigating damages. Because the statutory language excludes only those two uses, seat belt evidence may, by implication, be used for other purposes.<sup>57</sup> Product liability defense is the context in which seat belt evidence is most frequently allowed into evidence.

A plaintiff's failure to wear a seat belt is, at least in theory, introduced for a different purpose in a product liability action than it would be in a negligence action. In a product liability action, seat belt evidence is relevant to several defenses unrelated to a plaintiff's degree of fault for his injuries. First, product liability defendants are allowed to introduce evidence that a plaintiff did not buckle up to counter a design defect claim.<sup>58</sup> Because the seat belt is part of the vehicle's overall design, Kansas courts allow juries to consider non-use of a seat belt when evaluating whether the vehicle's design was defective or unreasonably dangerous.<sup>59</sup> In *Gardner*, for example, defendant Chrysler was allowed to argue that it should not be held liable under a design defect theory when the plaintiff failed to wear a seat belt and Chrysler's "design contemplated utilization of the seat belt which, it asserted, was integral to the seat design."<sup>60</sup> Second, seat belt non-use also can be considered in determining issues related to accident causation in product liability cases. It is admissible to counter a plaintiff's claim that a defective component caused the accident. For example, seat belt non-use has been admitted to show a vehicle's steering column was deformed by a non-belted plaintiff's body striking it during an automobile accident, disproving the notion that a defect in the steering column's design caused the accident.<sup>61</sup>

In addition to uses unique to product liability theories, at least one Kansas court has suggested that a plaintiff's non-use of a seat belt may

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57. *Gardner ex rel. Gardner v. Chrysler Corp.*, 89 F.3d 729, 736 (10th Cir. 1996) (applying Kansas law).

58. *Id.*

59. *Id.* at 734, 736-37; *Brand v. Mazda Motor of Am., Inc.*, No. 95-4139-SAC, 1996 WL 707018, at \*4 (D. Kan. Nov. 18, 1996).

60. *Gardner*, 89 F.3d at 733, 737 (affirming the trial court's ruling on the issue).

61. *Floyd v. Gen. Motors Corp.*, 960 P.2d 763, 765 (Kan. Ct. App. 1998).

be used to compare negligence in a product liability action. The court in *Watkins v. Hartsock* commented:

In an automobile product liability action, the manufacturer is allowed to introduce into evidence the nonuse or misuse of its product by the user for the purpose of . . . comparing negligence . . . . [T]he failure to use seat belts is treated no differently than the failure to properly use safety devices. For purposes of comparing negligence in product liability cases, evidence of a plaintiff's nonuse or misuse of an available safety restraint is a factual issue to be submitted to the jury.<sup>62</sup>

The *Watkins* court did not make clear why seat belt evidence should be relevant to comparative fault in the product liability, but no other, context. The result is that Kansas courts allow defendants in product liability actions to admit evidence that the plaintiff failed to wear his seat belt, whereas defendants in ordinary negligence actions cannot.

### III. ANALYSIS

Kansas's policy of excluding evidence of seat belt non-use for the purposes of determining comparative fault and mitigating damages, but admitting it for all others, has outlived whatever utility it might once have had.

#### A. *Pre-Comparative Fault Objections—As Exemplified By Hampton—Are No Longer on Point*

As both the law and public opinion regarding seat belt use have evolved since *Hampton* was decided in 1972, the rationale for following its reasoning<sup>63</sup> has eroded. Not only do Kansas's statutes mandating use of seat belts and child safety seats create a duty to use safety restraints in vehicles, but the increasing use of seat belts and awareness of their benefits suggests that citizens have embraced this duty. Additionally, because the risk of automobile accidents and the benefits of wearing seat belts have become common knowledge, motorists should be required to use the measures available to mitigate potential damages from a well-known risk. As a result, Kansas should diverge from *Hampton* and revise its statutes to allow consideration of seat belt non-use when comparing fault.

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62. *Watkins v. Hartsock*, 783 P.2d 1293, 1299 (Kan. 1989).

63. *See supra* Part II.B.2.

## 1. Seat Belt Laws Create a Legal Duty

In *Hampton* and subsequent cases decided before Kansas passed a mandatory seat belt law in 1986,<sup>64</sup> the Kansas Supreme Court stressed that absent a legal duty to wear seat belts, evidence of seat belt non-use could not be considered to determine a plaintiff's comparative fault in a negligence action. For example, the court reasoned in *Rollins v. Department of Transportation* that "[f]or there to be fault assessed in a negligence action there must be some duty which has been breached and as there is no duty to use seat belts in Kansas, there can be no fault attributed to a person for failure to use them."<sup>65</sup> By implication, if there were a duty to wear seat belts, a person failing to wear his seat belt would breach that duty, and a court should assess fault.

To the extent that *Hampton* and other decisions were premised on the idea that vehicle occupants have no legal duty to buckle up, they should be reconsidered in light of the legislatively-imposed duty to wear seat belts. The Kansas Supreme Court recognizes that a legal duty for purposes of negligence can "spring from a legislative enactment of a standard of conduct."<sup>66</sup> In fact, Kansas courts have stated that the existence of a legal duty to wear seat belts is best left to the legislature to decide.<sup>67</sup> By this reasoning, in its adoption of a mandatory seat belt law, the Kansas Legislature established by statute that it expects vehicle occupants to utilize seat belts.<sup>68</sup> The *Hampton* court's argument that there is no legal duty in Kansas to wear seat belts does not hold up considering the subsequent evolution of Kansas seat belt statutes.

## 2. The Reasonably Prudent Citizen Wears a Seat Belt

Although the *Hampton* court rejected the idea of a common-law duty to wear seat belts in 1972, subsequent decisions have left open the possibility that seat belt use could become the standard of care. "Kansas courts have recognized that a passenger owes a duty to exercise that care which a reasonably careful person would use for his own protection

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64. 1986 Kan. Sess. Laws 231-32 (codified as KAN. STAT. ANN. §§ 8-2501 through 2507 (2001)).

65. *Rollins v. Dep't of Transp.*, 711 P.2d 1330, 1332-33 (Kan. 1985).

66. *Watkins*, 783 P.2d at 1295.

67. *Taplin v. Clark*, 626 P.2d 1198, 1201 (Kan. Ct. App. 1981) (citing *Hampton v. State Highway Comm'n*, 498 P.2d 236, 249 (Kan. 1972)).

68. *See Barnes v. Robison*, 712 F. Supp. 873, 877 (D. Kan. 1989) (stating that "the recently enacted seat belt law now imposes a statutory duty to wear a seat belt").

under the existing circumstances.”<sup>69</sup> If a reasonably careful person traveling by car on Kansas roads would buckle up for his protection, then a plaintiff should be expected to meet that standard of care.

Today, the vast majority of American drivers use seat belts to protect their own safety. As mentioned previously, the NHTSA and other organizations have conducted high-profile national campaigns to promote the benefits of seat belts and the risks of non-use.<sup>70</sup> To measure the efficacy of its efforts to promote seat belt use, the NHTSA regularly conducts opinion surveys of drivers aged sixteen and older. In response to the NHTSA’s 2003 Motor Vehicle Occupant Safety Survey, 84% responded that they used seat belts “all of the time” while driving.<sup>71</sup> When asked why they did so, 66% of respondents cited “injury avoidance”—the most commonly offered reason.<sup>72</sup> This data indicates that the NHTSA’s message has gotten through to most American motorists.

In Kansas also, a majority of vehicle occupants buckle up. Although historically Kansas has lagged behind the national average, a 2007 survey by the Kansas Department of Transportation found that 75% of Kansans use seat belts.<sup>73</sup> This usage rate is higher than in 2006, when Kansas ranked 43rd in the nation in seat belt use.<sup>74</sup> While Kansas could improve in its relative ranking, it is nevertheless clear that most Kansans use seat belts.

High levels of seat belt use, both in Kansas and nationally, demonstrate that seat belt use has become the recognized standard of care for motorists. In 1972, the *Hampton* court cited common experience in finding a lack of evidence that seat belt use constituted “the accepted community standard of care.”<sup>75</sup> This argument, however, has less merit in the face of high and increasing rates of seat belt use. Because the significant risk of an automobile accident and the benefits of seat belt use are common knowledge today, if not at the time *Hampton* was decided, Kansas jurisprudence should acknowledge that the failure to wear seat

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69. *Akins v. Hamblin*, 703 P.2d 771, 773 (Kan. 1985) (citing *McGlothlin v. Wiles*, 487 P.2d 533, 536 (Kan. 1971)).

70. *See supra* Part I.

71. Executive Summary, NHTSA, 2003 Motor Vehicle Occupant Survey, available at [http://www.nhtsa.dot.gov/people/injury/research/2003mvoss\\_survey\\_vo12/pages/ExecSummary.htm](http://www.nhtsa.dot.gov/people/injury/research/2003mvoss_survey_vo12/pages/ExecSummary.htm).

72. *Id.*

73. *Seat Belt Usage up in Kansas*, TOPEKA CAP.-J., Sept. 16, 2007, available at [http://www.cjonline.com/stories/091607/kan\\_199988048.shtml](http://www.cjonline.com/stories/091607/kan_199988048.shtml).

74. *Id.*

75. *Hampton v. State Highway Comm’n*, 498 P.2d 236, 249 (Kan. 1972), *superseded by statute on other grounds*, Kansas Tort Claims Act, KAN. STAT. ANN. §§ 75-6101 through 6115, *as recognized in Force v. City of Lawrence*, 838 P.2d 896 (Kan. Ct. App. 1992).

belts defies motorists' ordinary standard of care. As a result, there is no reason for a jury to turn a blind eye to a plaintiff's failure to wear a seat belt when determining comparative negligence.

### 3. Motorists Must Take Reasonable Precautions Against Known Risks

The *Hampton* court alluded to, and subsequent opinions confirm, the idea that individuals have a duty to mitigate their potential damages from known risks, including car accidents. Most recently, the Kansas Supreme Court recognized that "one is required to use reasonable diligence to *minimize* one's damage once the risk is known."<sup>76</sup> The court explained that the term "mitigation of damages" encompasses all factors that would reduce damages.<sup>77</sup> In the context of seat belts, at least one commentator has interpreted this language as acknowledging "a common law duty to mitigate damages once a risk is known, and the presence of seat belts in cars puts people on notice of the risk of car accidents."<sup>78</sup>

Undoubtedly, Kansans are informed of the high probability of automobile accidents and the risk of serious injury from each accident. As the Tenth Circuit stated more than thirty years ago, "in this day and age the function of seat belts is a matter of common knowledge."<sup>79</sup> Today, newsletters issued by the Kansas Turnpike Authority highlight the utter commonality of serious automobile accidents, reminding Kansans that "almost all of us will be involved in a serious automobile crash at some point in our life."<sup>80</sup> The Kansas Department of Transportation emphasizes the important role of seat belts in reducing the severity of accidents. It makes readily available on its Web site statistics on the number of traffic fatalities each year in Kansas, including the percentage of passengers who were not wearing seat belts. In 2006, for example, there were 468 traffic fatalities in Kansas; 60% of these passengers were not buckled up.<sup>81</sup>

In addition, it is common knowledge among drivers nationally that using one's seat belt greatly decreases the risk of being seriously injured

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76. *Watkins v. Hartsock*, 783 P.2d 1293, 1295 (Kan. 1989) (emphasis in original).

77. *See id.* (stating that damage mitigation includes "every fact that would tend to decrease damages").

78. William E. Westerbeke, *Survey of Kansas Tort Law: Part II*, 50 U. KAN. L. REV. 225, 254-55 (2002).

79. *Marshall v. Ford Motor Co.*, 446 F.2d 712, 715 (10th Cir. 1971) (applying Oklahoma law).

80. *There's No Good Excuse for Not Buckling up*, KAN. TURNPIKE NEWS, March 2006, at 1.

81. *Welcome News: Kansas Drivers Should Work to Make 2007's Lower Traffic Fatality Figure the Beginning of a Long-Term Trend*, LAWRENCE J.-WORLD, Jan. 14, 2008, available at [http://www2.ljworld.com/news/2008/jan/14/welcome\\_news/](http://www2.ljworld.com/news/2008/jan/14/welcome_news/).

in an automobile accident. Most modern-day drivers have discarded concerns, common in the pre-comparative fault era, about whether seat belts helped or hindered accident survivability. In response to the NHTSA's 2003 Motor Vehicle Occupant Survey, 95% of drivers agreed with the statement, "if I were in an accident, I would want to have my seat belt on."<sup>82</sup> Presumably as a result of their belief in the efficacy of seat belts, 88% of the survey's respondents support laws—like the Kansas statute—that mandate use of seat belts in front seating positions.<sup>83</sup>

Broad public knowledge of the risk of automobile accidents and awareness of seat belts as a preventive measure arguably imposes on motorists a duty to take available protective measures to limit their exposure to risk. Kansas courts have long recognized that there are risks so obvious and widely recognized that individuals must act to mitigate them. This duty may be particularly appropriate in situations, such as seat belt use, where risk-mitigating measures are well-known and required by statute. As a result, the *Hampton* court's argument that one need not act preemptively to mitigate the risk of vehicular injury should no longer be persuasive to exclude evidence of non-use.

*B. Exclusion of Seat Belt Evidence Is Inconsistent with Kansas's Comparative Fault System*

Kansas's exclusion of evidence of a plaintiff's failure to buckle up is consistent neither with the tenets of comparative fault nor with Kansas's treatment of evidence of traffic violations. Whereas comparative fault seeks to tie recovery to each party's fault, Kansas's seat belt statute precludes defendants in automobile negligence actions from introducing evidence on a key aspect of the plaintiff's fault. In addition, the statute singles out seat belt evidence for treatment different than that of other traffic violations. Because the seat belt statute is inconsistent with comparative fault and with laws governing traffic offenses, Kansas should amend it.

1. Exclusion of Seat Belt Evidence and Comparative Fault

By definition, the actions of both parties in litigation are relevant to a determination of comparative fault. By adopting comparative fault,

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82. Executive Summary, NHTSA, *supra* note 71.

83. *Id.*

Kansas signaled its view that both a party's duty to pay and the amount he should be required to pay should be limited by the plaintiff's negligence.<sup>84</sup> The Kansas Supreme Court recognizes as relevant to any tort suit the actions of any party who had a hand in the resultant harm. As the court explained, "our comparative negligence statute 'requires a weighing of the causal negligence, if any, of all parties whose conduct brought about the harm, and the consequent imposition of individual liability for damages based upon the proportionate fault of each party to the occurrence.'"<sup>85</sup>

The selective exclusion of seat belt evidence, however, effectively renders this doctrine moot with respect to automobile negligence defendants. As discussed above, a plaintiff who fails to wear his seat belt has not only violated a state statute but also, arguably, has failed to exercise the care the vast majority of the population would exercise under the same conditions. To the extent his injuries would have been less severe had he worn a seat belt, a plaintiff unquestionably bears some fault for the extent of his injuries, as it was his decision not to buckle up. Under Kansas's statute, however, a jury could not consider this evidence when determining comparative fault. Nor could it consider a plaintiff's failure to wear a seat belt in assessing damages, even though the plaintiff's compensatory damages likely are closely related to the extent of his injuries, to which his seat belt non-use contributed. Kansas's law excluding seat belt evidence in effect creates a windfall for the incautious plaintiff.

In addition, comparative fault negates the argument that admitting seat belt evidence is unduly harsh to injured plaintiffs.<sup>86</sup> Under comparative fault, allowing a jury to consider a plaintiff's failure to buckle up no longer dooms the plaintiff to zero recovery. As discussed above, now that the vast majority of motorists use seat belts, the perceived inequity of allowing seat belt evidence to deny or reduce recovery for a massive number of plaintiffs is no longer a persuasive argument.

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84. *Brown v. Keill*, 580 P.2d 867, 873-74 (Kan. 1978).

85. *Cox v. Lesko*, 953 P.2d 1033, 1042 (Kan. 1998) (citing *Arredondo v. Duckwall Stores, Inc.*, 610 P.2d 1107, 1110 (Kan. 1980)).

86. The defendant propounded this argument unsuccessfully in *Taplin v. Clark*. 626 P.2d 1198, 1200 (Kan. Ct. App. 1981).



## 2. Seat Belt Non-Use Should Be Treated Like Other Traffic Violations

In contrast to evidence of seat belt non-use, Kansas courts admit evidence of traffic violations as a factor relevant to determining comparative fault and mitigation of damages. In general, “in a case involving a vehicle, the trial court has a duty to instruct the jury on the applicable traffic statutes.”<sup>87</sup> For example, Kansas juries are allowed to consider whether one party was speeding when evaluating the parties’ comparative fault.<sup>88</sup> Kansas juries also can consider whether a plaintiff driver crossed the street’s center line as a factor relevant to comparative negligence.<sup>89</sup> Specifically, a district court applying Kansas law held that “[u]nder the comparative negligence system applicable to this case, ‘where there is evidence of a causal connection between the statutory violation and the injury complained of, the matter would be submitted to the jury as a *factor* in determining apportionment of fault . . . .’”<sup>90</sup> As seat belt non-use is also a statutory violation, it is reasonable to analogize to violations of traffic statutes and allow the jury to consider it as a factor relevant to comparative fault and mitigation of damages.

Although it could be argued that seat belt non-use can be distinguished from other violations because it is a failure to act instead of an action, this distinction should not govern its admissibility to bear on comparative fault. There is no question that not buckling up is not an affirmative action in the same sense as a wrongful action such as speeding. However, failing to follow a statute is analogous to failing to follow a doctor’s orders, which the Kansas Supreme Court has held admissible for the purposes of comparative fault in a medical malpractice action.<sup>91</sup> If a plaintiff’s failure to follow a doctor’s orders, absent any law requiring her to do so, is admissible to show fault, then failure to follow a statutory directive to wear a seat belt also should be admissible.

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87. *Guillan v. Watts*, 808 P.2d 889, 895 (Kan. Ct. App. 1991) (citing *Schallenberger v. Rudd*, 767 P.2d 841, 842 (Kan. 1989)).

88. *Id.*

89. *See Abernathy v. United States*, No. 89-4171-R, 1992 WL 104939, at \*2 (D. Kan. Apr. 1, 1992) (holding that the plaintiff’s crossing the center line does not warrant summary judgment for the defendant and is instead a factor for the jury to consider).

90. *Id.* (quoting *Eli v. Bd. of County Comm’rs*, 681 P.2d 673, 675 (Kan. 1984)) (emphasis in original).

91. *Cox v. Lesko*, 953 P.2d 1033, 1040 (Kan. 1998).

*C. Selective Exclusion of Seat Belt Evidence Is Illogical*

Although inadmissible to compare negligence or mitigate damages, seat belt non-use is admissible in Kansas courts for any other relevant purpose.<sup>92</sup> Seat belt evidence is introduced in product liability actions filed against automobile manufacturers, such as the Derrick Thomas case in Missouri. Kansas courts allow defendants to introduce evidence of a plaintiff's failure to use seat belts to defend against a plaintiff's design defect and accident causation theories.<sup>93</sup>

There is no clear-cut reason why product manufacturer defendants should be entitled to use seat belt evidence when defendants in ordinary negligence actions are not. Although there are several uses for seat belt evidence that are unique to product liability actions, those are not necessarily the only proper uses for seat belt evidence. The conclusion that seat belt evidence is admissible in any context other than comparative negligence and damages is based on a plain-text interpretation of section 8-2504(c) of the Kansas Statutes.<sup>94</sup> It is not derived from any statement of a legislative intent to favor product liability defendants over other defendants. Although seat belt evidence certainly is relevant and useful in defending against product defect allegations, it is no less relevant or useful in defending against claims of ordinary negligence, for the reasons already discussed. In practice, Kansas's selective exclusion of seat belt evidence means that a jury would be required to evaluate differently the situations of two individuals—like Derrick Thomas and Jon Corzine—who failed to wear seat belts, simply because of the title of their claim. The jury in a product liability suit would hear repeated references to a plaintiff's practices with respect to seat belts, but this information would be kept from the jury in a personal injury suit due to the bar against considering seat belt evidence to decide comparative fault or damage mitigation.

In addition, selective admission of seat belt evidence could present unnecessary logistical hurdles for the trier of fact. If the court allowed the jury to hear evidence that a plaintiff failed to buckle up, it would then need to instruct the jury to disregard that fact for the purposes of determining comparative fault and assessing damages. Like any other

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92. *See supra* Part II.B.2.

93. *See Gardner ex rel. Gardner v. Chrysler Corp.*, 89 F.3d 729, 736 (10th Cir. 1996) (applying Kansas law) (stating that seat belt evidence is admissible if introduced to defend against a defect claim).

94. *Id.*

instruction to disregard, there is no guarantee a jury will heed the judge's instruction. The *Gardner* court recognized that jurors may have difficulty keeping seat belt evidence out of mind when deciding fault. It commented that "the average juror may not be able to divest the presence of a seat belt with the moral implication it ought to be worn . . . ."<sup>95</sup> There is no reason why jurors *should* have to refrain from the thought that not wearing an available seat belt carries some fault, especially when seat belt use is required by statute. Revising Kansas statutes to allow consideration of seat belt non-use to determine comparative negligence, is a more logically consistent and easily applied approach than the selective exclusion required by current law.

#### *D. Other States' Reasoning*

Kansas courts have long acknowledged a difference of opinion between jurisdictions on whether to allow seat belt evidence for the purposes of comparative fault and damages mitigation. As the *Taplin* court noted in 1978, "there is obviously a split of authority on the issue, with a slight majority of the comparative negligence jurisdictions rejecting the seat belt defense."<sup>96</sup> If Kansas were to revise its statutes today, it would find plenty of examples in other states' laws.

A growing minority of states allow juries to consider evidence of a plaintiff's failure to use a seat belt when deciding comparative fault and mitigation of damages. States differ both in the evidence they allow, and if they allow seat belt evidence for purposes of mitigation, the extent to which a plaintiff's damages can be mitigated. As of 2004, twenty-six states and the District of Columbia prohibited use of seat belt evidence, four states allowed it only in product liability actions, eight states allowed it to mitigate damages, eight states allowed it as evidence of comparative fault, and three states had no firm policy.<sup>97</sup> Some states that allow the evidence for comparative fault—including, for example, California—allow juries to consider evidence of seat belt non-use with respect to negligence if a defendant proves a seat belt was available, a reasonably careful plaintiff would have used it but the plaintiff did not, and plaintiff's injuries would have been less severe if he had worn the seat belt.<sup>98</sup> With respect to mitigation of damages, some states, such as

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95. *Id.* at 737.

96. *Taplin v. Clark*, 626 P.2d 1198, 1201 (Kan. Ct. App. 1981).

97. Scott E. Harvison, *It's Time for Missouri to Buckle Up and Adopt the Seat Belt Defense*, 60 J. Mo. B. 234, 234–35 (2004).

98. *Franklin v. Gibson*, 188 Cal. Rptr. 23, 25 (Cal. Ct. App. 1982).

Iowa, cap the amount by which damages can be mitigated by a plaintiff's failure to wear a seat belt.<sup>99</sup> Other states, including Colorado, allow seat belt evidence to mitigate a plaintiff's damages for pain and suffering, but not for economic loss or medical expenses.<sup>100</sup>

The reasoning by which other states in the Midwest and Mountain regions have decided to allow seat belt evidence for comparative fault and damages mitigation is persuasive with respect to Kansas. First, some states admit the evidence because they recognize that motorists have a common-law duty to wear seat belts even absent a statutory duty, due to the sheer obviousness of the risk. The Wisconsin Supreme Court, for example, stated that "as a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts" and so is under a duty "based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate."<sup>101</sup> In Kansas today, there is a statutory duty to wear a seat belt, and widespread knowledge of the safety benefits associated with seat belt use.

Second, other states allow seat belt evidence on the basis that motorists are obliged to take basic steps to protect themselves from the reasonably foreseeable risk of automobile accidents. The Michigan Supreme Court, for example, rejects the argument that motorists need not wear seat belts in anticipation of other drivers' negligence. That court commented, "it cannot be seriously contended that automobile passengers are under no obligation whatsoever to exercise due care for their own safety because accidents are unforeseeable."<sup>102</sup> The court held that the jury should be allowed to decide whether failure to use a seat belt constitutes a deviation from the general standard of care expected of motorists.<sup>103</sup>

Third, still other states take the position that seat belts are such a simple and well-known way to reduce risk that a jury should be able to mitigate a plaintiff's damages for failing to wear one. In Colorado, for example, drivers must fasten all available safety belts to defeat a claim of failure to mitigate damages.<sup>104</sup> In deciding to admit for the purpose of damage mitigation evidence that a motorcyclist failed to wear a helmet, the North Dakota Supreme Court relied on reasoning from a previous

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99. IOWA CODE § 321.445(4)(b)(1)-(2) (2007).

100. COLO. REV. STAT. § 42-4-237(7) (2006).

101. *Bentzler v. Braun*, 149 N.W.2d 626, 639-40 (Wis. 1967).

102. *Lowe v. Estate Motors Ltd.*, 410 N.W.2d 706, 715 (Mich. 1987).

103. *Id.*

104. *Carlson v. Ferris*, 58 P.3d 1055, 1058 (Colo. Ct. App. 2002).

seat belt decision, which suggested that because seat belts are an unusually accessible means of minimizing potentially serious damages, a jury should be able to consider that fact when assessing damages.<sup>105</sup>

For additional reasons to amend its statute, Kansas need look no further than the arguments that persuaded other states' supreme courts. There is no evidence to suggest that motorists in Kansas are so dissimilar to those in Wisconsin, Michigan, Colorado, or North Dakota that those courts' reasoning should not apply with equal force in Kansas.

*E. Amending the Statute Is Consistent with Recent Legislative Trends in Kansas*

Seat belt usage continues to be an important concern for Kansas legislators, as well as lawmakers nationally. In the last few years, Kansas's lower rates of seat belt usage, as compared with other states, have drawn attention from both policymakers and media. The high levels of interest are motivated not only by safety, but also by financial concerns. "Kansans' lack of safety belt usage has been of interest in the media recently due to a federal proposal to give additional funding to states whose citizens buckle up."<sup>106</sup> Although seat belt usage is increasing in Kansas, legislators' continued interest in seat belt issues suggests the time is ripe to amend Kansas's statutes to allow evidence of seat belt non-use for comparative fault and mitigation of damages.

Several legislative actions taken within the past year show Kansas legislators' desire to provide strong encouragement for seat belt use. The National Transportation Safety Board and other groups addressed Kansas legislative subcommittees in 2007, urging them to adopt primary enforcement of all seat belt violations.<sup>107</sup> The Kansas House Committee on Transportation followed these groups' advice and introduced a bill that would have allowed primary enforcement for seat belt violations by both adults and youths.<sup>108</sup> Although the Kansas Legislature did not extend primary enforcement for all violations of the mandatory seat belt statute, it did adopt an alternative bill providing for primary enforcement for seat belt violations by individuals less than eighteen years of age.<sup>109</sup>

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105. Halvorson v. Voeller, 336 N.W.2d 118, 121 (N.D. 1983) (citing Spier v. Barker, 323 N.E.2d 164, 168 (N.Y. 1974)).

106. *There's No Good Excuse for Not Buckling up*, *supra* note 80.

107. *See, e.g.*, Statement of the National Transportation Safety Board for the Transportation Committee, Kansas House of Representatives on Senate Bill 2136, Feb. 14, 2007, <http://www.nts.gov/Speeches/s070214a.htm> (last visited Apr. 20, 2008).

108. *Supplemental Note on Substitute for H.B. 2136*, 2007 Leg. (Kan.).

109. *See supra* Part II.A.2.

In addition, the legislature ended the long grace period that allowed violators of the mandatory seat belt law to receive only a warning and not a citation. Since January 2008, violators have received fines instead of warnings.<sup>110</sup>

The steps taken by the Kansas Legislature in the past year suggest the legislature is increasingly amenable to measures promoting seat belt use. Allowing juries to factor an individual's seat belt practices into his degree of fault and the damages to which he is entitled surely would provide an additional economic incentive to wear seat belts. This incentive seems compatible with the current climate promoting seat belt use.

Although one could argue that Kansas's mandatory seat belt law was not originally aimed at punishing motorists, it seems likely that the ultimate goal of the law was to change behavior, whether by education or punishment. Past Kansas attorneys general have taken conflicting positions on whether the seat belt law was merely educational or also designed to punish non-users into compliance. In 1997, the Kansas Attorney General wrote that "[t]he [Safety Belt Use] Act is primarily intended to educate adults and minors concerning the benefits of using their safety belts at all times while operating a vehicle."<sup>111</sup> However, in 1987, soon after the statute was passed, the attorney general concluded that "[t]he Kansas Safety Belt Use Act is penal in nature."<sup>112</sup> Also, if the entire purpose of the law was education, the fines going into effect in January 2008 would be unnecessary, because the goal of education would be accomplished through warnings. Regardless of the statute's original purpose, amending it to allow motorists to be allocated some fault for failure to wear seat belts would provide motivation to change behavior.

#### *F. Recommendation*

As the previous sections demonstrate, allowing juries to consider non-use of seat belts by plaintiffs in personal injury actions fits with the legal, social, and technological changes that have taken place since *Hampton* was decided. It is less clear-cut how, in practical terms, courts should admit the evidence. Admitting seat belt evidence strictly for comparative fault or strictly for damage mitigation would create well-known challenges. It is problematic to consider a plaintiff's failure to

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110. *Id.*

111. 31 Kan. Op. Att'y Gen. No. 97-65 (1997), 1997 WL 470844.

112. 21 Kan. Op. Att'y Gen. No. 87-129 (1987), 1987 WL 290374.

wear a seat belt as evidence the plaintiff was comparatively negligent in a straight-up comparison with the defendant, in that the plaintiff's omission did not actually cause the accident; the omission merely aggravated the resulting damages.<sup>113</sup> As a result, to declare a plaintiff comparatively negligent for the full extent of his injuries seems unjust.<sup>114</sup> Considering the evidence as damage mitigation also presents a risk of injustice, in that the plaintiff's failure to wear a seat belt would always deny him any recovery for the portion of his injuries the jury decides would not have occurred had he worn a seat belt.

The best approach for Kansas, therefore, is a two-step compromise approach rooted in comparative negligence, similar to that suggested by scholar Michael Gallub.<sup>115</sup> This approach requires the defendant to submit expert testimony or other evidence to bifurcate a plaintiff's injuries into those that were inevitable from the nature of the accident and those a seat belt could have prevented.<sup>116</sup> The jury would then conduct a two-step comparative fault analysis in which it would first compare the plaintiff's and the defendant's degree of fault for the injuries inevitable from the injury, and then compare the plaintiff's and the defendant's fault for the aggravated injuries that could have been prevented by seat belt use.<sup>117</sup> This approach would allow a jury to allocate some fault to the plaintiff for his refusal to buckle up, while not denying the plaintiff recovery for the portion of his injuries that wearing a seat belt would not have prevented.

Although this approach likely would be more demanding for a jury and require a more rigorous level of proof than a straightforward comparing of fault, Kansas precedent from other contexts demonstrates that juries are capable of performing detailed comparative fault analyses. The Kansas Supreme Court held that juries should be required to perform separate calculations of pecuniary and non-pecuniary damages for each death in a multi-plaintiff wrongful death action.<sup>118</sup> In a medical malpractice suit in which the plaintiff failed to follow her doctor's orders, the court assumed the jury was able to understand and follow fairly complicated instructions for comparative fault and mitigation of damages that were designed to prevent the jury from double-penalizing the plaintiff for her conduct.<sup>119</sup> As juries have been capable of carrying

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113. Gallub, *supra* note 36, at 327.

114. *Id.* at 329.

115. *See id.*

116. *Id.* at 322.

117. *See id.* at 345.

118. *McCart v. Muir*, 641 P.2d 384, 394 (Kan. 1982).

119. *Cox v. Lesko*, 953 P.2d 1033, 1038 (Kan. 1998).

out these two-tiered analyses, there is no reason to believe they would be unable to perform a two-step comparative negligence analysis incorporating a degree of fault for a plaintiff who fails to wear his seat belt.

#### IV. CONCLUSION

There are many clear reasons to amend Kansas's statute to allow consideration of seat belt evidence for the purpose of comparing fault in personal injury cases, and few reasons to leave it intact. In the face of a mandatory seat belt law, Kansas's exclusion of such evidence fails to serve a rational purpose, considering the backdrop of comparative fault and lawmakers' overwhelming concern for seat belt usage. The underlying reasons not to admit seat belt evidence, as enunciated by the Kansas Supreme Court in *Hampton*, no longer ring true in light of the changes in law, policy, technology, and motorists' behavior over the last thirty years. Other states have already recognized the changes in the times by admitting seat belt evidence for consideration in comparative fault, mitigation of damages, or both. Finally, there is no reason one individual's highly publicized violation of the mandatory seat belt statute should be admitted, as was Derrick Thomas's, and another individual's equally newsworthy failure likely excluded, as would be Jon Corzine's, simply because of the type of claim brought.