



Volume 93 | Issue 2

Article 4

January 1991

Wright v. Hanley: No Seatbelt Defense under West Virginia Tort Law

D. Kevin Coleman

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Torts Commons](#)

Recommended Citation

D. K. Coleman, *Wright v. Hanley: No Seatbelt Defense under West Virginia Tort Law*, 93 W. Va. L. Rev. (1991).

Available at: <https://researchrepository.wvu.edu/wvlr/vol93/iss2/4>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

WRIGHT v. HANLEY: NO SEATBELT DEFENSE UNDER WEST VIRGINIA TORT LAW

I.	INTRODUCTION.....	387
II.	ARGUMENTS FAVORING THE SEATBELT DEFENSE.....	391
	A. <i>The Admissibility of Seatbelt Evidence</i>	391
	B. <i>Reasonable Care</i>	392
	C. <i>Reasonably Avoidable Damages</i>	393
	D. <i>Obligation To Wear Seatbelts</i>	393
	E. <i>Per Se Negligent Behavior</i>	394
III.	ARGUMENTS DISFAVORING THE SEATBELT DEFENSE	394
	A. <i>The Plaintiff in No Way Caused the Accident</i> ..	395
	B. <i>No Duty to Mitigate Damages</i>	395
	C. <i>Undue Burden and Prejudice</i>	396
	D. <i>No Duty to Wear a Seatbelt</i>	397
IV.	THE FACTS OF <i>WRIGHT v. HANLEY</i>	397
V.	THE COURT’S DECISION AND RATIONALE.....	398
VI.	AN EVALUATION OF THE COURT’S OPINION	400
VII.	CONCLUSION.....	402

I. INTRODUCTION

For over twenty-five years American courts have wrestled with the status to be afforded evidence of a plaintiff’s nonuse of an available seatbelt in personal injury actions arising from motor vehicle accidents.¹ Two factors have been largely responsible for the increasing acceptance of the so-called “seatbelt defense” by state judiciaries. The first factor contributing to the erosion of the early reluctance of some state courts to recognize the seatbelt defense has been the ever-increasing public recognition of the safety advantages of seatbelt use.² This is both apparent from and a product of the

1. The first reported recognition of the seatbelt defense by an American court occurred in *Stockinger v. Dunish* (Sheboygan County, Wis. Cir. Ct. 1964). See Note, *The Seatbelt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME L. REV. 272, 272 n.2 (1980) [hereinafter Note, *Comprehensive Guide*].

2. 3 AM. JUR. PROOF OF FACTS 3D 71, 79 (1989). See also *Amend v. Bell*, 89 Wash. 2d 124, 570 P.2d 138 (1977).

enactment of state and federal regulations mandating the use³ and installation⁴ of safety restraints in passenger vehicles.

A second important factor which has contributed to the increasing adoption of the seatbelt defense has been the almost total abandonment of the common law doctrine of contributory negligence.⁵ Today, an overwhelming majority of states have adopted some form of comparative negligence.⁶

The seatbelt defense is not so much a rule of law but rather a rule on the admissibility of evidence.⁷ Generally, defense counsel have attempted to introduce evidence of a plaintiff's nonuse of an available seatbelt to show comparative or contributory negligence on the plaintiff's part,⁸ or to argue that the plaintiff had failed to mitigate damages⁹ or both.¹⁰ Aside from certain procedural aspects, the actual recoveries for similarly situated plaintiffs should be the same whether such evidence is used to determine a plaintiff's percentage of fault, or whether it is admitted to show a failure to mitigate.¹¹

The negligence aspect of the seatbelt defense centers around the argument that the plaintiff's failure to use an available seatbelt could be judged by the finder of fact as a failure to exercise the care of a reasonably prudent person under the circumstances.¹² Accordingly, it is argued that such evidence should go to the jury in its determination of the plaintiff's responsibility for her own injuries.¹³ The plaintiff's recovery is offset by the percentage of fault for her injuries attributable to her nonuse of an available seatbelt.¹⁴

3. *E.g.*, W. VA. CODE § 17C-15-46 (1986) (mandating safety restraint use for all children under nine); N.Y. VEH. & TRAF. § 1229-c (McKinney 1986) (mandating safety restraint use for all children and front seat occupants).

4. *E.g.*, W. VA. CODE § 17C-15-43 (1986) (requiring all automobiles to be equipped with seatbelts); 49 C.F.R. § 571.208 (1989) (occupant crash protection regulations).

5. *See Swajian v. General Motors Corp.*, 559 A.2d 1041, 1043 (R.I. 1989).

6. W. PROSSER & W. KEETON, *THE LAW ON TORTS*, § 67, (5th ed. 1984).

7. 35 AM. JUR. TRIALS 362, 408 (1987).

8. *See Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

9. *See State v. Ingram*, 427 N.E.2d 444 (Ind. 1981).

10. *See Keaton v. Pearson*, 292 S.C. 579, 358 S.E.2d 141 (1987).

11. 35 AM. JUR. TRIALS, *supra* note 7, at 415.

12. *Dahl v. BMW*, 304 Or. 558, 565, 748 P.2d 77, 81 (1987).

13. *Id.*

14. *See id.*

The second commonly proffered version of the seatbelt defense involves the failure to mitigate injuries.¹⁵ Under this approach, the defendant argues that evidence of seatbelt nonuse should be admissible at trial on the issue of whether the plaintiff failed in his duty to mitigate his own damages by not wearing an available seatbelt.¹⁶ The rule which requires an individual to take reasonable steps to mitigate his own injuries is commonly equated to the doctrine of avoidable consequences.¹⁷

Both the comparative negligence and the mitigation theories of the seatbelt defense place an affirmative duty on the defendant to show that the plaintiff was not using an available and functioning seatbelt at the time of the accident.¹⁸ Furthermore, the defendant must demonstrate a causal relationship between the plaintiff's nonuse of an available seatbelt and some or all of the plaintiff's injuries.¹⁹ This proof requires the introduction of expert testimony at trial.²⁰

Many jurisdictions have been slow to accept either version of the seatbelt defense due to the perceived resistance of the American public to utilize seatbelts as a part of their everyday travel.²¹ The acceptance, however, of the comparative negligence theory with its focus on the relative fault of the parties,²² coupled with changing American attitudes toward seatbelt use,²³ has provided a major impetus for the increasing acceptance of the seatbelt defense through-

15. See *Waterson v. General Motors Corp.*, 111 N.J. 238, 263, 544 A.2d 357, 370 (1988). See also 3 AM. JUR. PROOF OF FACTS 3D, *supra* note 2, at 79.

16. See 3 AM. JUR. PROOF OF FACTS 3D, *supra* note 2, at 79.

17. See *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1984). See generally W. PROSSER & W. KEETON, *supra* note 6, § 65.

18. 3 AM. JUR. PROOF OF FACTS 3D, *supra* note 2, at 87-88.

19. *Id.* at 89.

20. *Id.* at 90.

21. See *Miller v. Miller*, 273 N.C. 228, 238, 160 S.E.2d 65, 73 (1968) ("The scant use which average motorist makes of his seat belt . . . indicates that court should not impose a duty . . . to use them . . ."). But see *Hutchins v. Schwartz*, 724 P.2d 1194, 1198 (Alaska 1986) ("[T]he fact that a majority of people act in a certain manner does not make that conduct reasonable . . .").

22. See generally *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979) (explaining comparative negligence).

23. 3 AM. JUR. PROOF OF FACTS 3D, *supra* note 2, at 79.

out the United States.²⁴ The public's attitude toward seatbelts has been influenced a great deal by the increasing irrefutability of scientific evidence as to the efficacy of seatbelts in improving accident survivability.²⁵

The seatbelt defense has engendered a wide range of justifications for both its adoption and rejection by state courts throughout the country.²⁶ This divisiveness of opinion demonstrates the difficulty courts have had in adapting the seatbelt defense to traditional views of causation and fairness.²⁷ In recent years this question has been answered for many courts by the majority of state legislatures which have adopted mandatory seatbelt use laws.²⁸ These statutes typically permit²⁹ or exclude³⁰ the evidence of violations in civil trials. Some of these laws specifically limit the percentage by which a plaintiff's recovery can be reduced for failure to wear a seatbelt.³¹

This Note begins with an overview of the arguments which have been advanced for and against the adoption of the seatbelt defense. The focus then shifts to an evaluation of the West Virginia Supreme Court of Appeals decision in *Wright v. Hanley*.³² *Wright* marked the first time in which the court was faced with the question of whether evidence of a plaintiff's nonuse of an available seatbelt was admissible in a personal injury action in West Virginia.³³

24. *Waterson v. General Motors Corp.*, 111 N.J. 238, 263, 544 A.2d 357, 370 ("the more recent cases overwhelmingly adopt some variation [of the seatbelt defense]").

25. *See Motor Vehicle Mfr. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29 (1983).

26. *Compare Insurance Co. of North America v. Pasakarnis*, 451 So. 2d 447 (Fla. 1984) (fastening a seatbelt requires "minimal effort") and *Bentzler*, 149 N.W.2d 626 (finding a common law duty to buckle up) with *Clarkson v. Wright*, 108 Ill. 2d 129, 483 N.E.2d 268 (1985) (holding that there is no duty to anticipate defendant's negligence) and *Ingram*, 427 N.E.2d 444 (Ind. 1981) (mitigation is strictly a post-accident duty).

27. *See Westenberg, The Safety Belt Defense at Trial and in Out-of-Court Settlement*, 37 U. FLA. L. REV. 785, 788 (1985) ("The safety belt defense does not conform readily with . . . traditional tort doctrines . . .").

28. *Id.* at 801.

29. *E.g.*, FLA. STAT. ANN. § 316.613 (West Supp. 1989).

30. *E.g.*, CAL. VEH. CODE § 27315(i) (Deering Supp. 1990).

31. *E.g.*, MICH. STAT. ANN. § 9.2410(5) (1989) (5% limitation on damage reduction).

32. 387 S.E.2d 801 (W. Va. 1989).

33. *But cf. State v. Nester*, 336 S.E.2d 187 (W. Va. 1985) (holding that the failure to wear a seatbelt was not an intervening cause of victim's death due to drunk driving).

II. ARGUMENTS FAVORING THE SEATBELT DEFENSE

The following discussion focuses on some of the justifications which have been raised by defense counsel, judges, and legal scholars in favor of the recognition of the seatbelt defense in personal injury actions. Because many of these arguments are based upon the reasonableness of the plaintiff's failure to wear an available seatbelt, they are interrelated in some ways.

A. *The Admissibility of Seatbelt Evidence*

The near total abandonment of the common law rule of contributory negligence by the majority of states³⁴ demonstrates a desire by lawmakers and judges to do away with the all-or-nothing harshness of the old common law rule and replace it with a rule of law which more fairly apportions responsibility according to the relative fault of the parties.³⁵ This argument in favor of the admissibility of seatbelt evidence premises findings of fault based upon each party's causal responsibility for the plaintiff's injuries rather than their causal connection to the injury-producing event.³⁶

The position that seatbelt evidence should be admissible to properly assess each party's responsibility for the resultant injuries finds some support in Justice Miller's opinion in *Bradley v. Appalachian Power Co.*,³⁷ in which the West Virginia Supreme Court of Appeals first adopted the doctrine of comparative negligence.³⁸ In his discussion on proximate cause under the new standard, Justice Miller stated that:

before any party is entitled to recover it must be shown that the negligence of the defendant was the proximate cause of the accident *and subsequent injuries*. The same is true of contributory fault or negligence. Before it can be counted

34. W. PROSSER & W. KEETON, *supra* note 6.

35. See *Clarkson v. Wright*, 108 Ill. 2d 129, 134, 483, N.E.2d 268, 270 (1985) (Ryan J., dissenting).

36. See Høglund & Parsons, *Caveat Viator: The Duty to Wear Seatbelts Under Comparative Negligence Law*, 50 WASH. L. REV. 1, 14-15 (1974). See also RESTATEMENT (SECOND) OF TORTS § 433A, comment c (1966).

37. 163 W. Va. 332, 256 S.E.2d 879 (1979).

38. *Id.*

against a plaintiff, *it must be found to be the proximate cause of his injuries.* (emphasis added)³⁹

The acceptance of seatbelt evidence in a "modified" comparative negligence jurisdiction,⁴⁰ such as West Virginia, requires the finder of fact to adopt a schizophrenic view of proximate cause. This is because evidence of seatbelt nonuse is considered irrelevant in assessing fault for the accident;⁴¹ such evidence, however, is crucial to determining responsibility for the injuries which resulted.⁴²

B. Reasonable Care

The second justification often advanced in favor of the seatbelt defense is the plaintiff's duty to exercise the ordinary care of a reasonably prudent person under the circumstances.⁴³ This duty applies to taking steps to ensure one's own safety from unreasonable yet foreseeable dangers.⁴⁴

Under this due care approach to the seatbelt defense, it is argued that, given the inherent dangers of travelling in automobiles⁴⁵ and the availability⁴⁶ and effectiveness of a safety belt in reducing the harm which could result from a traffic accident,⁴⁷ a finder of fact could conclude that under the circumstances it would be unreasonable for a plaintiff not to have utilized an available seatbelt.⁴⁸ This view, like the first, places a premium on allowing the jury to determine the weight to be given to certain facts in judging the responsibility of the parties, "rather than preventing the relevancy of such evidence from ever being considered due to some prophylactic bar on its admission."⁴⁹

39. *Id.*

40. *See generally* 256 S.E.2d 879 (1979).

41. *Waterson v. General Motors Corp.*, N.J. 238, 264, 544 A.2d 357, 370 (1988).

42. *Id.*

43. *See Insurance Co. of North American v. Pasakarnis*, 451 So. 2d 447 (Fla. 1984).

44. *See Note, Comprehensive Guide, supra* note 1, at 280.

45. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS, 63 (1985) [hereinafter ACCIDENT FACTS].

46. *See* 35 AM. JUR. TRIALS, *supra* note 7, 349, 362 n.4 (more than 95% of all passenger vehicles equipped with seatbelts).

47. *Id.* at 362.

48. *Pasakarnis*, 451 So. 2d at 453.

49. *See id.* at 454.

C. Reasonably Avoidable Damages

This approach looks to whether it is fair to require a defendant, whose negligence may only be slight, to compensate for possibly astronomical injuries, most, if not all, of which could have been avoided had the plaintiff bothered "to expend the minimal effort required to fasten an available seatbelt."⁵⁰ This fairness argument is inherent in the mitigation theory of the seatbelt defense. Under the mitigation doctrine, the plaintiff cannot recover for any injuries which could have been avoided if reasonable steps had been taken.⁵¹

The life-threatening dangers inherent in automotive travel are now common knowledge.⁵² The defendant should not be made to suffer for the plaintiff's "never-happen-to-me" attitude. To believe that "the chance of being involved in an injury-producing accident is relatively low"⁵³ each time one gets into an automobile obviously ignores reality.

D. Obligation To Wear Seatbelts

Under a more utilitarian view of the seatbelt defense, it is argued that in the absence of legislation creating an affirmative duty to wear an available seatbelt, the courts should create such a duty as a matter of public policy.⁵⁴ Thousands of persons are killed annually and millions more are injured as a result of motor vehicle accidents.⁵⁵ These facts, when coupled with the overwhelming body of scientific evidence showing that an extraordinary number of these deaths and injuries could be averted through the proper use of seatbelts,⁵⁶ provide a convincing argument that the public good demands that we all subject ourselves to the arguable inconvenience of buckling up whenever we travel in an automobile.⁵⁷

50. *Id.* at 453 (quoting *Insurance Co. of North America v. Pasakarnis*, 425 So. 2d 1141 (Fla. Dist. Ct. App. 1982)) (Schwartz, J., dissenting).

51. *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1988).

52. See ACCIDENT FACTS, *supra* note 45, at 45.

53. *Miller v. Miller*, 273 N.C. 228, 231, 160 S.E.2d 65, 68 (1968).

54. See Note, *Comprehensive Guide*, *supra* note 1, at 283.

55. ACCIDENT FACTS, *supra* note 45, at 45.

56. *Id.* at 53.

57. *But see, Amend. v. Bell*, 89 Wash. 2d 124, 570 P.2d 138 (1977).

The importance of seatbelt use as a matter of public policy is reflected in legislation mandating the installation of seatbelts in all passenger vehicles.⁵⁸ Similarly, laws requiring that all infants be restrained while travelling shows the important public concern for the use of safety restraints in automobiles.⁵⁹ The introduction of seatbelt evidence in civil trials would lead to an increased use of available seatbelts by the general public within the state; mandatory seatbelt use legislation appears to have had this effect.⁶⁰

E. Per Se Negligent Behavior

A final argument for the seatbelt defense, which applies only to those states with seatbelt laws which are silent as to the effect of evidence of a criminal violation introduced during a civil trial,⁶¹ is that the seatbelt defense comports well with the common law notion that the standard of conduct of a reasonably prudent person may be prescribed by legislation.⁶² Consequently, in these few states, a violation of a mandatory seatbelt use law can logically be viewed as negligence per se.⁶³ At the very least, a violation should be evidence of negligence on the plaintiff's part.⁶⁴ This view is particularly convincing when it is shown that the violation of the statute proximately caused or aggravated the injuries received by the plaintiff.⁶⁵

III. ARGUMENTS DISFAVORING THE SEATBELT DEFENSE

The following discussion is devoted to the arguments which have been advanced against the adoption of the seatbelt defense. A careful observation will reveal that some of these justifications are merely twists on the premises used to extol the virtues of the seatbelt defense.

58. See e.g., W. VA. CODE § 17C-15-43 (1986).

59. See e.g., *id.* § 17C-15-46 (1986).

60. 3 AM. JUR. PROOF OF FACTS 3D, *supra* note 2, at 96.

61. E.g., N.J. REV. STAT. § 39:3-76.2a (1988) (child restraints).

62. W. PROSSER & W. KEETON, *supra* note 6, § 36, at 220.

63. *Id.* at 230.

64. *Id.*

65. *Id.* at 225.

A. *The Plaintiff in No Way Caused the Accident*

One strong argument which dictates against the adoption of the seatbelt defense is that it reduces all or part of a plaintiff's recovery on the basis of an omission which in no way contributes to the occurrence of the injury-producing event.⁶⁶ One can envision a situation in which a seriously injured plaintiff is left with little or no relief because a negligent defendant successfully demonstrates, through expert testimony, that the plaintiff would have received little or no injuries had she been wearing an available seatbelt. This result seems unfair even if one concedes that the failure to wear a seatbelt. Clearly the defendant's active negligence is much more responsible for the plaintiff's plight.⁶⁷

The preceding scenario, which seems entirely plausible in a seatbelt defense jurisdiction, illustrates the problem with a scheme which measures liability according to each party's responsibility for the resulting injuries rather than for the injury-producing event.⁶⁸ The failure to fasten a seatbelt alone could not prove injurious to a plaintiff.⁶⁹ At most, one could say that the plaintiff had increased the likelihood of receiving more serious injuries from the defendant's negligent behavior.⁷⁰

B. *No Duty to Mitigate Damages*

Under the doctrines of avoidable consequences and mitigation of damages a plaintiff has no right to recover for any injuries which she could have reasonably avoided following the defendant's legal wrong.⁷¹ Since the plaintiff's failure to fasten an available seatbelt must occur *prior* to the accident, then the admission of seatbelt evidence cannot properly be admitted to show a failure on the plaintiff's part to mitigate his injuries.⁷²

66. Note, *Comprehensive Guide*, *supra* note 1, at 284.

67. *See id.*

68. *See* Morast v. James, 87 Or. App. 368, 742 P.2d 666 (1987).

69. Note, *Comprehensive Guide*, *supra* note 1, at 284.

70. Clarkson v. Wright, 108 Ill. 2d 129, 132, 483 N.E.2d 268, 269 (1985).

71. Welsh v. Anderson, 228 Neb. 79, 82, 421 N.W.2d 426, 428 (1988).

72. *Id.* at 429.

Some courts have argued that such a rule would amount to a requirement that the plaintiff anticipate and guard against the defendant's wrong.⁷³ This is contrary to the traditional common law view that one can expect others to take reasonable care when driving.⁷⁴ Consequently, the plaintiff's nonuse of an available seatbelt could not constitute a failure to mitigate damages.⁷⁵

In response, however, a few courts have questioned the continued validity of the view of the avoidance of negligent harm as a strictly post-accident duty.⁷⁶ Under the common law, one's pre-accident conduct was judged under the rule of contributory negligence,⁷⁷ whereas one's post-accident duty was guided by the rule of avoidable consequences.⁷⁸ Therefore, it is argued that this doctrine of contributory negligence has been almost completely discarded.⁷⁹

C. *Undue Burden and Prejudice*

The introduction of the seatbelt defense would lead to a "battle of the experts" on the causal relationship between the plaintiff's injuries and the failure to wear a seatbelt.⁸⁰ It has been argued that such evidence is too speculative to aid the fact-finder in rendering a fair judgement.⁸¹ Seatbelt evidence would burden an already cumbersome process⁸² and invite jurors to render verdicts based on passions and prejudices.⁸³ Such testimony better enables a jury to find in favor of a more sympathetic yet clearly negligent defendant.⁸⁴

73. *Amend v. Bell*, 89 Wash. 2d 124, 570 P.2d 138 (1977).

74. *Id.*

75. *See Clarkson v. Wright*, 108 Ill. 2d 129, 483 N.E.2d 268; (1985) *State v. Ingram*, 427 N.E. 444 (Ind. 1981); *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1977); *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968); *Amend v. Bell*, 89 Wash. 2d 124, 570 P.2d 138 (1977).

76. *See Law v. Superior Court*, 157 Ariz. 142, 755 P.2d 1130 (1986); *Clarkson*, 108 Ill. 2d at 137, 483 N.E.2d at 272 (Ryan, J., dissenting).

77. *See Clarkson*, 108 Ill. 2d at 137, 483 N.E.2d at 272 (Ryan, J., dissenting).

78. *Id.*

79. *See id.*

80. *Amend*, 89 Wash. 2d at 133, 570 P.2d at 143.

81. *Miller*, 273 N.C. at 238, 160 S.E.2d at 70.

82. *See Westenberg*, *supra* note 27, at 789.

83. *Lipscomb v. Diamiani*, 226 A.2d 914, 917 (Del. Sup. Ct. 1967).

84. *See id.*

In addition, the standard of reasonable care *under the circumstances* gives the jury little guidance in determining whether a plaintiff was negligent for failing to wear a seatbelt.⁸⁵ While this argument may have some merit, it seems that it could as easily be applied to a great deal of the fact-finding which takes place in civil litigation.

D. No Duty to Wear a Seatbelt

Another strength of nonrecognition of the seatbelt defense is that absent a mandatory seatbelt use law it can be argued that one is under no duty to wear a seatbelt.⁸⁶ Whether such a duty should exist is a decision better left to the legislative and executive branches of the state.⁸⁷ Since the state legislature is empowered to mandate the use of seatbelts,⁸⁸ its failure to do so should be respected by the courts.⁸⁹ The view that the judiciary should defer to the legislature on the question of whether there exists a duty to wear an available seatbelt was adopted by the West Virginia Supreme Court of Appeals in *Wright v. Hanley*.⁹⁰

IV. THE FACTS OF *WRIGHT V. HANLEY*

The dispute in question arose out of a traffic accident which occurred in Wheeling, West Virginia in 1983. The accident involved separate cars operated by the plaintiff, Wright, and defendant, Hanley.⁹¹ Wright's two children were passengers in his car at the time of the collision.⁹² The plaintiff brought an action in the circuit court to recover for the injuries he and his children sustained.⁹³

At trial each party claimed that the other had run a red light at the intersection where the accident had taken place.⁹⁴ The evidence

85. *Id.*

86. Keaton v. Pearson, 292 S.C. 579, 358 S.E.2d 141 (1987).

87. *Id.*

88. See 3 AM. JUR. PROOF OF FACTS 3D, *supra* note 2, § 3.

89. See Pearson, 358 S.E.2d 141.

90. Wright v. Hanley, 387 S.E.2d 801 (W. Va. 1989).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

adduced at trial showed that neither the plaintiff nor his children were wearing seatbelts at the time of the accident.⁹⁵ It is uncertain from the court's opinion whether or not the plaintiff objected to the introduction of this evidence at trial.⁹⁶ The jury found the plaintiff fifty-one percent causally responsible for the accident, and accordingly, Wright was denied any recovery under West Virginia's comparative negligence formula.⁹⁷

Wright's sole contention on appeal was that the circuit court judge gave the jury the following seatbelt instruction in error:

You are instructed that Dennis Wright had a duty to exercise due care for his own safety. There has been testimony in this case that Mr. Wright's car was equipped with a seatbelt, which he was not using at the time.

If you believe that the failure of Mr. Wright to wear his safety belt was a negligent act on his part and further, if you believe that failure to wear a safety belt proximately caused or contributed to Mr. Wright's injuries, then you may consider this act of negligence as a factor in determining the amount of damages, if any, to be awarded to Mr. Wright *and as a factor in assessing fault for the collision.* (emphasis added)

The court must caution the jury that the failure to wear seatbelts in no way affects the amount of damages which may be recovered by Lee and Gladys Wright.⁹⁸

V. THE COURT'S DECISION AND RATIONALE

The West Virginia Supreme Court of Appeals, in an opinion authored by Justice Workman, unanimously reversed the lower court on the grounds that there exists no duty upon a motor vehicle passenger to wear an available seatbelt, absent legislation to the contrary.⁹⁹ Justice Workman divided her discussion on seatbelt usage into two main parts. The first part discussed whether there was a duty in West Virginia to wear a seatbelt¹⁰⁰ while the second part of the opinion focused on whether evidence of seatbelt nonuse could be admitted to show that the plaintiffs had failed to mitigate their damages.¹⁰¹

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 802.

99. *Id.* at 801.

100. *Id.* at 802-03.

101. *Id.* at 803-04.

The *Wright* court first noted that while automotive vehicles in West Virginia must be equipped with safety belts,¹⁰² there is no statutory duty upon an individual to actually use one.¹⁰³ Acknowledging that a few courts have found that a duty to wear a seatbelt existed under the common law standard of ordinary care,¹⁰⁴ the court looked to whether such a common law duty existed in West Virginia. Justice Workman quoted from the decision in *Miller v. Miller*,¹⁰⁵ in which the North Carolina Supreme Court held that no duty existed under the common law to wear a seatbelt and that consequently such evidence was inadmissible at trial.¹⁰⁶ The West Virginia Supreme Court's opinion appropriated language from *Miller* which questioned the efficacy of the reasonable person standard in determining whether the failure to wear a seatbelt is a negligent act.¹⁰⁷

In a footnote to its discussion on whether or not there existed a duty to wear an available seatbelt, the *Wright* court noted that West Virginia's governor had, only the year before, vetoed a mandatory seatbelt law passed by the legislature, which explicitly excluded the admissibility of violations from civil trials.¹⁰⁸ The court concluded this portion of its analysis by "refrain[ing] from imposing a standard of conduct that the legislature has thus far been unsuccessful in imposing."¹⁰⁹

The *Wright* court gave similar treatment to the question of whether seatbelt evidence could be used to show a failure to mitigate damages.¹¹⁰ The court quoted language from *State v. Ingram*¹¹¹ which held that failing to buckle a seatbelt should not be considered under a doctrine which imposed no duty on the plaintiff until after he had been wronged by the defendant.¹¹² The court proceeded to quote

102. See W. VA. CODE § 17C-15-43 (1986).

103. *Wright*, 387 S.E.2d at 802-03.

104. *Id.* (citing *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967)).

105. 273 N.C. 228, 160 S.E.2d 65 (1968).

106. *Id.*

107. *Wright*, 387 S.E.2d at 803.

108. *Id.* n.6.

109. *Id.* at 803.

110. *Id.*

111. 427 N.E.2d 444 (Ind. 1981).

112. *Id.*

from a few other decisions which raised concerns with the adoption of a rule requiring individuals to mitigate their damages in advance of the defendant's wrongdoing.¹¹³

The court held that in the absence of a duty to wear a seatbelt for one's own protection, the nonuse of a seatbelt could not be advanced to prove a failure to mitigate.¹¹⁴ The court concluded by quoting language from *Miller* which argues that the seatbelt defense would only lead to prejudicial and inconsistent verdicts.¹¹⁵ Aside from the fact that giving the seatbelt instruction constituted plain error, the court also felt that the instruction may have confused the jury in its determination of the parties' percentages of negligence.¹¹⁶

VI. AN EVALUATION OF THE COURT'S OPINION

The West Virginia Supreme Court of Appeals' decision that the state legislature is the proper forum for the imposition of a duty on individuals to wear seatbelts is a sound exercise of judicial restraint, especially when one considers the recent history of seatbelt legislation in this state. An opposite ruling would in a certain respect have been tantamount to an overriding of the governor's veto, something the legislature was unable to do. The court, by its ruling in *Wright* understandably wants to avoid the impression that it is taking sides on an issue on which the legislative and executive branches had only recently sparred.

One likes to believe that if the majoritarian processes in the state are truly functional, and the citizens of West Virginia truly desire a seatbelt law, then the state legislature, emboldened by the election of a new governor who shares party affiliation with the overwhelming majority of the members, will attempt anew to enact a mandatory seatbelt use law. A decision by the *Wright* court imposing a duty to wear a seatbelt could possibly have stifled any existing legislative initiative in this area. Logic would seem to suggest that a statutory pronouncement requiring West Virginians to buckle up,

113. *Wright*, 387 S.E.2d at 803-04.

114. *Id.*

115. *Id.*

116. *Id.*

coupled with appropriate fines for noncompliance, would be more effective than a common law duty to do so.

Another justification for the court's deferential approach is that the seatbelt defense is a tough issue which does not fit easily into either the doctrines of comparative negligence or mitigation of damages. While each side can for different reasons claim that its view is just, the court's ruling suggests that the fairest way to handle the issue is to allow the citizens of West Virginia, through their elected representatives, to decide for themselves.

While the result reached by the court in *Wright* is prudent, many of the cases cited by Justice Workman in support of the court's reasoning seemed to be lacking as a basis for the refusal to find a seatbelt defense in West Virginia. One example is the court's extraction of language from *Miller* in which the North Carolina Supreme Court refused to hold that the common law placed a duty on individuals to wear seatbelts.¹¹⁷ The citing of this case is misleading for a number of reasons. First of all, *Miller* is over twenty years old and at least part of the court's reasoning in the case was founded on now outdated premises, such as the idea that the "social utility of wearing a seatbelt [had yet to] be established in the mind of the public"¹¹⁸ and that some "researchers have reached the conclusion that the use of seatbelts is limited in value."¹¹⁹

A second problem with the court relying on the *Miller* holding is that it did not rule out the use of such evidence in all cases. In his opinion for the North Carolina court, Justice Sharp said in dicta that

[c]onceivably a situation could arise in which a plaintiff's failure to have his seatbelt buckled at the time he was injured would constitute negligence. It would, however, have to be a situation in which the plaintiff, with prior knowledge of a specific hazard — one not generally associated with highway travel and one which a seatbelt would have protected him — had failed or refused to fasten his seatbelt.¹²⁰

117. *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968).

118. *Id.* at 296.

119. *Id.*

120. *Id.* at 70.

A final factor, which undermines the applicability of *Miller* to the question of whether or not nonuse of a seatbelt can be evidence of negligence in West Virginia, is that North Carolina continues to adhere to the rule of contributory negligence.¹²¹ Accordingly, the possibility of injustice resulting from a finding that seatbelt nonuse constitutes negligence, in the jurisdiction in which *Miller* was decided, is far greater than in West Virginia.

A case quoted by Justice Workman in her discussion on mitigation of damages, which is also only marginally supportive, is the decision of the Oregon Court of Appeals in *James v. Morast*.¹²² In *Morast*, the Oregon Court of Appeals reversed a lower court's verdict in a suit over an automobile accident, on the grounds that it was error for the court to instruct the jury that nonuse of an available seatbelt could be weighed as evidence of the plaintiff's failure to mitigate.¹²³ This decision is of dubious value to the West Virginia Supreme Court's ultimate holding in *Wright* because, although the Oregon Supreme Court affirmed the decision of the court of appeals, it did so on different grounds.¹²⁴ The Oregon Supreme Court ruled — in a companion case to its decision in *James v. Morast* — that seatbelt evidence though inadmissible on the issue of mitigation of damages was admissible as evidence of the plaintiff's comparative negligence.¹²⁵

VII. CONCLUSION

The West Virginia Court of Appeals' decision in *Wright v. Hanley* to defer to the legislature on the question of an individual's duty to use an available seatbelt in the state, was the wisest course to take. This is especially true when one considers the continuing public discourse over mandatory seatbelt use legislation as well as the relative balance between the arguments for and against the seatbelt defense. It would seem truly anti-majoritarian for the court to tip the balance in this narrow debate. Perhaps it would have been better

121. W. PROSSER & W. KEETON, *supra* note 6 § 67.

122. 87 Or. App. 368, 742 P.2d 665, *aff'd on other grounds*, 304 Or. 571, 748 P.2d 84 (1987).

123. *Id.*

124. *Morast v. James*, 304 Or. 571, 748 P.2d 84 (1987).

125. *Dehn v. BMW*, 304 Or. 558, 748 P.2d 77 (1987).

had the court issued a short per curiam opinion rather than cite language which, though seemingly supportive, came from cases which add little credence to the court's larger decision that seatbelt evidence is inadmissible in personal injury actions in West Virginia.

A truly ironic part of the whole debate over the seatbelt defense is that the advances in scientific technology from which it arose will probably someday make it an anachronism of tort law. With the advent of passive safety-belts and airbags, the plaintiff's nonuse of an available seatbelt may become a thing of the past.

D. Kevin Coleman

