own person. She also noted an episode on March 24 in her records questioning night time mental changes. Testator was found at the foot of his bed, rocking back and forth. John argues that behavior showed mental incompetency, while Nurse Hurley explained that testator said his leg hurt and opined the rocking was probably the result of a leg cramp and that he was trying to restore circulation.

Moreover, not until two weeks after the will was signed did the testator ask Nancy to write nine checks which he signed. That was at a time when he was in the intensive care unit. Before that he had been writing them himself. All of this adds to the presumption that the testator possessed the necessary testamentary capacity to execute a will on March 29. See *Ziel,* supra, at 537, 731-2, and *Kuzma,* supra, at 95, 1371.

There was testimony by Donald Rooney, social worker at the National Institutes of Health, that when the testator arrived there on April 10 he was confused and partially disoriented but that was attributed to exhaustion. By April 14, before surgery, testator was once again alert and not disoriented. His consent for the surgery was acquired by a physician. Nothing the doctor observed at that time caused him to suspect that testator was not competent to sign his own consent, which he did.

John's second argument is that the will was the product of undue influence upon the testator by Nancy Yocum. To establish this contention it must be shown that testator was of weakened intellect when he executed the will, that Nancy Yocum was in a confidential relationship with him and that she received a substantial benefit. *Shelly,* supra, at 332, 103, *Ziel,* supra, at 541, 733. Obviously Nancy received a substantial benefit under the will. But as discussed earlier, the evidence does not show that he was of weakened intellect at the time he executed the will. Neither did a confidential relationship exist whereby Nancy exerted an "overmastering influence" over testator. *Ziel,* 542, 734. Undue influence destroys one's free agency, which results from imprisonment of the body or mind, fraud, threats, misrepresentations, or inordinate flattery. *Id.,* at 541, 733. None of these were present here.

When Nancy acted to contact the attorney for him it was at testator's direction. The attorney checked with the hospital, independent of Nancy, to determine testator's purpose, and the

hospital followed normal procedures to ensure that the will was what testator wanted. When the will was signed, Nancy was not present. Actually, Nancy was in no position to execute undue influence over the testator while he was in the Veterans' Administration facility. All she did was visit him with her daughter from time to time, and no evidence suggests that she even had an opportunity to influence his will. Nor was she conducting his financial affairs which would lead to a conclusion that the parties were no longer dealing on equal terms so that he was dependent on her. *Id.,* at 542, 734. The assistance she rendered was at his request.

So the evidence is not sufficient to conclude that Nancy exerted an undue or overmastering influence over the testator. Accordingly, we dismiss John Michael Patton's appeal from probate of the will of Earl Patton.

ORDER OF COURT

January 30, 1985, the appeal of John Michael Patton from probate of the will of Earl R. Patton is dismissed. The costs shall be paid by the appellant.

DOPUDJA V. GREYHOUND LINES, INC., C.P., Fulton County Branch, No. 231 of 1981-C

Negligence - Automobile Accident - Use of Seat Belts - Damages

1. The plaintiffs' failure to use a seat belt may be considered on the issue of damages only where there is expert testimony that seat belts would have mitigated the plaintiffs' damages.

2. While there is no common law duty in Pennsylvania to wear seat belts, competent evidence of avoidable consequences may be considered by the jury in awarding damages.

F. William Brogun, Jr., Esq., Counsel for Plaintiffs

Stanley J. Kerlin, Esq., Counsel for Plaintiffs

Lawrence J. Newton, Esq., Counsel for Defendants

OPINION AND ORDER

Eppinger, P.J., February 8, 1985:

Donna Dopudja was driving an automobile on the Pennsylvania Turnpike. Michael Dopudja was in the right front passenger seat. The left rear wheel came off of a bus driven by Robert L. Rohrbaugh, owned by Fullington Bus Company and leased to Greyhound Lines. The wheel rolled into the lane of traffic in which Donna had to drive to pass the bus and her car struck it. At the time Donna's car hit the wheel, it was flat on the highway.

Donna was driving east on the turnpike. Suddenly sparks and a cloud of smoke appeared in front of Donna from the rear of the bus. When her car hit the wheel, it landed on top of it, rocked back and forth and side to side, and Donna was thrown forward, then upwards against the roof. She was injured from contact with the roof of the car. Michael suffered a sprained wrist. Neither was wearing a seat belt.[1] The injuries to both were precipitated by the collision with the wheel and tire.

The wheel came off the bus because all ten studs, later determined by the bus owner to have been faulty, broke off at the same time. This was an unusual happening. An accident reconstruction expert testified that no injury would have occurred to Donna if she had been wearing a seat belt and shoulder harness.

The case was submitted to the jury on a Verdict Form. The three defendants had agreed that the negligence of one should be attributed to all and in response to Question 1, the jury found that the defendants were negligent.

The second question asked the jury to decide whether the negligence of the defendants was a substantial factor in bringing about plaintiff's harm. They answered, "No". If they came to that conclusion, they were told that the plaintiffs could not recover and that they should not answer any other questions and return to the courtroom. This they did. There was no objection to this part of the Verdict Form by plaintiffs' counsel.

[1] The car was equipped with seat belts and shoulder harnesses on both of the front seats.

BEING the same real estate which Allen V. Twigg and Barbara J. Twigg, his wife, by deed dated May 29, 1979, and recorded among the deed records of Franklin County, Pennsylvania in Deed Book Vlume 789, Page 459, conveyed to Mark A. Lawyer and Penny Lawyer, his wife.

PARCEL B: ALL the following described real estate lying and being situate in St. Thomas Township, Franklin County, Pennsylvania, bounded and described as follows:

BEGINNING at a set iron pin at existing stones at corner of Tract No. 1 hereinabove described at land now or formerly of Helen M. Keller; thence by land now or formerly of Helen M. Keller, South 42 degrees 30 minutes West, 398.56 feet to an iron pin at lands now or formerly of David Brechbill; thence by lands now or formerly of David Brechbill, North 62 degrees 6 minutes 34 seconds West, 2,407.50 feet to an iron pin at lands now or formerly of Emmanuel Bonebrake's heirs; thence by lands now or formerly of Emmanuel Bonebrake's heirs; North 35 degrees 11 minutes East, 306.50 feet to an existing stone pile at Tract No. 1 hereinabove described; thence by Tract No. 1 hereinabove described, South 61 degrees 35 minutes 33 seconds East, 2,442.21 feet to a set iron at existing stones the place of beginning.

CONTAINING 16.32 acres or 710,899.2 square feet and being Parcel A on a subdivision of land for Helen Keller by William A. Brindle Associates, dated October 14, 1975, which, together with the necessary municipal approvals is recorded among the deed records of Franklin County, Pennsylvania, in Deed Book Volume 720, Page 492.

TOGETHER with all of the Grantors' right, title and interest in and to the use of a private road, being a right-of-way fifty (50) feet in width, for ingress, egress and regress to the real estate hereby conveyed, pursuant to the terms and conditions of a certain agreement dated April 30, 1973, and recorded among the deed records of Franklin County, Pennsylvania in Deed Book Volume 686, Page 876.

BEING part of the same real estate which Allen V. Twigg and Barbara J. Twigg, his wife, by deed dated May 29, 1979, and recorded among the deed records of Franklin County, Pennsylvania in Deed Book Volume 789, Page 459, conveyed to Mark A. Lawyer and Penny Lawyer, his wife.

IMPROVED with a one-story frame siding dwelling house containing seven rooms, one bath and a partial basement. The property has a septic system and spring water. There is also one outbuilding. The street address of the property is 8497 Fort McCord Road, Chambersburg, Pennsylvania.

BEING sold as the property of Mark A. Lawyer and Penny A. Lawyer, his wife, Writ No. AD 1985-122.

SALE NO. 10
Writ No. AD 1985-216 Civil 1985
Judg. No. AD 1985-216 Civil 1985
Valley Bank and Trust Company
—vs—
D. Michael Grove and
Carolyn Jean Grove
Atty: Robert C. Schollaert

ALL THAT CERTAIN following described real estate lying and being situated in Montgomery Township, Franklin County, Pennsylvania, more particularly bonded and described as follows, to wit:

LEGAL NOTICES, cont.

BEGINNING at a railroad spike in the centerline of Township Route 321, known as Burkholder Road and running thence by lands of Douglas E. Grove and Jessie E. Grove, his wife, North twenty (20) degrees seven (7) minutes East, five hundred sixty-nine and fifty hundredths (569.50) feet to an iron pin; thence by same, South sixty-nine (69) degrees fifty-three (53) minutes East, four hundred (400) feet to an iron pin; thence by same, South twenty (20) degrees seven (7) minutes West, five hundred sixty-nine and fifty hundredths (569.50) feet to an iron spike in the centerline of the aforesaid Township Road; thence in the centerline of said Township Road, North sixty-nine (69) degrees fifty-three (53) minutes West, four hundred (400) feet to a spike, the place of beginning.

CONTAINING 5.229 acres, more or less, as surveyed April 13, 1977 by Arrowood, Incorporated, the aforesaid plan being reviewed by the Franklin County Planning Commission April 18, 1977, and approved by the Board of Supervisors of Montgomery Township April 19, 1977.

BEING the same real estate which Douglas E. Grove and Jessie E. Grove, his wife, by their deed dated May 13, 1977, and recorded in Franklin County, Pennsylvania in Deed Book Volume 742, Page 176, conveyed to D. Michael Grove and Carolyn Jean Grove, his wife.

IMPROVED with a one-story brick rancher containing six rooms, two baths and a full basement. The property has a well and septic system. The street address of the property is 8393 Royer Road, Mercersburg, Pennsylvania.

BEING sold as the property of D. Michael Grove and Carolyn Jean Grove, Writ No. AD 1985-216.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, December 23, 1985 at 4:00 P.M., E.S.T. Otherwise all money previously paid will be forfeited and the property will be resold on Friday, December 27, 1985 at 1:00 P.M., E.S.T. in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

11-15, 11-22, 11-29

Following the point for charge requested in *Parise v. Fehnel,* 267 Pa. Super. 79, 406 A.2d 345 (1979), defendants asked us to include in the questions submitted to the jury one to determine whether Donna's car was equipped with seat belts, if so whether they were using the seat belts, and whether there was a causal connection between her nonuse of seat belts and her injuries. We then included in the charge a statement that they could consider the failure to use the seat belts on the issue of damages only. The jury never got to this question, though the court explained the Verdict Form and the jury had taken it out with them.

The plaintiffs have filed a motion for a new trial. The important contention of the plaintiffs is that the court refused to charge the jury that there was no law in Pennsylvania which requires a person to wear a seat belt and that it is not contributory negligence to fail to wear a seat belt. We were being asked to take seat belts out of the case. We do not think such an instruction would have been correct because we know of no Pennsylvania appellate court decisions that have determined that failure to use seat belts is not an item of negligence. The existence of negligence is usually a question to be submitted to a jury upon proper instructions, and a court should not remove such issue from a jury unless facts leave no room for doubt, *East Texas Motor Freight, Diamond Division v. Lloyd,* Pa. Super. , 484 A.2d 797 (1984). What our Superior court said in *Parise*, supra., 82, 347, is that the possibility of a "so-called 'seat belt defense' " is not foreclosed in future cases in Pennsylvania. In *Parise* there was no expert testimony, as there was here, that wearing a seat belt would have made any difference.

Some states have ruled that the failure to wear seat belts may on proof result in a finding that plaintiff failed to mitigate damages and contributed to the injuries. Several states have rejected any version of the seat belt defense, *Id.,* at 82-3, 347, and other states have not committed themselves, indicating that they may adopt some version of the defense if presented with a suitable case. *Id.,* at 82-3, 347, cites omitted. In *Barry v. Coca Cola Co.,* 239 A.2d 273 (Superior Ct. New Jersey 1967), the court determined the defense would be permitted if there was expert testimony showing a relationship between the injuries to plaintiff and the failure to use seat belts and when comparative, rather than contributory, negligence is applied. *Id.,* at 280. In this way, plaintiffs' damages are reduced rather than precluded. In those states which allow evidence of the nonuse of the seat belts, the court will look for

support in the testimony by expert witnesses to show the causal connection between the failure to use them and the injury. *Spier v. Barker,* 323 N.E. 2d 164, 176 (Ct. of Appls. New York 1974).

In *Rissi v. Levan and Thompson,* 89 Montg. 276 (1967), the court left it to the jury under the general instructions on contributory negligence to decide whether the nonuse of a seat belt was contributory negligence. [2] However, in *Zahber v. Schwartz and Martz,* 10 Mercer Co., L.J. 171 (1970), the trial court held that the public had not by that time sufficiently accepted the social utility of seat belts to make their use contributory evidence. *Id.,* at 176. The court went on to say, however, "The public may in the future accept and use them so universally that it will be negligence not to apply them." *Id.,* at 177.

So finding as we do that the seat belt defense was properly submitted to the jury, the question now is whether, as contended by the plaintiffs, the finding of the jury that defendants were negligent but the negligence was not a substantial cause in bringing about the harm to the plaintiffs, was illogical and contrary to the evidence.

If the jury believed, as it may have, that Donna's injuries were caused, not by hitting the tire, but because she was not wearing a seat belt at the time they hit the tire, then it is not illogical or against the weight of the evidence. In a motion for a new trial, it is not for the trial judge to sit as a thirteenth juror. *Buck v. Scott Township,* Pa. Super. , 427 A.2d 691, 694 (1984). Neither is it enough that we may have arrived at a different conclusion. What is necessary is that the verdict shock our sense of justice or is clearly inconsistent with the evidence. *Bertab, Inc. v. Fox,* 275 Pa. Super. 76, 79, 418 A.2d 618, 620 (1980); *Buck v. Scott Township,* supra, at 694-5; *Burrell v. Phila-Electric Co.,* 438 Pa. 286, 289, 265 A.2d 516, 518 (1970).

In *Pritts v. Lowery Trucking Co.,* 400 F. Supp. 867, 872 (W.D. Pa. 1975), while holding that courts in Pennsylvania would not

[2] The case was appealed to the Supreme Court April 4, 1967, but was returned to the trial court because judgment had not been taken on the verdict. There was no further action.

impose a common law duty to wear seat belts, *Id.,* at 871, the court did believe that Pennsylvania would allow competent evidence of avoidable consequences to be considered by the jury in awarding damages. Later *Vizzini v. Ford Motor Co.,* 72 F.R.D. 132 (E.D.Pa. 1976) the court excluded expert testimony of nonuse of seat belts in mitigation of damages, saying that such a defense was inappropriate in a death claim based on product's liability and would introduce comparative negligence into the case when it was not yet the law of Pennsylvania. *Id.,* 138, 139. The law in effect at the time of the *Vizzini* accident holding contributory negligence to be a bar to recovery has been supplanted by comparative negligence tests. 42 Pa.C.S.A. §7102(a).

Still later, the *Benner v. Interstate Container Corp.,* 73 F.R.D. 502 (E.D.Pa. 1977) court felt that nonuse of seat belts may be considered in mitigation of damages if guarded by an admonition that nonuse must be unreasonable in a case where expert testimony is offered to show the relationship between the nonuse and the injuries. *Id.,* at 504, 505.

Our previous discussion does not mean that we think this was necessarily a seat belt verdict. We also charged on the assured clear distance ahead rule. We charged generally on contributory negligence and the verdict form opened to the jury the duty to consider such negligence in a comparative way.

We cannot know how the jury reached its decision. but in contemplating the verdict, it is arguable that the jury could have reached the result achieved in answering Question 2 (defendants' negligence was not a substantial factor in bringing about plaintiffs' harm) by finding Donna Dopudja was comparatively more than 50% responsible for her injuries or that if she had used her seat belt her injuries would have been 100% less. So we do not feel at liberty to tamper with the result the jury achieved simply because if we had wanted to do the same thing, we might have reached the result by a different route.

As to Michael, we do not recall except very tangential evidence that had he been wearing a seat belt he would not have been injured. So on the seat belt issue alone we would have to grant him a new trial. But since the jury could have resolved the issues of responsibility by finding that Donna's negligence alone, as in

failing to stop soon enough, caused his injuries; she, not the defendants, was responsible. Taking this view, the jury could have found for the defendants.

Some of the remaining contentions in the motion for new trial are related to the negligence issue, others are not. One is that it was error for us to examine a sample bolt of the kind that sheared off. It is argued that this lent credibility to the defendants' case and improperly influenced the jury. We do not agree. Where the condition of a material object is in issue and relevant, its inspection by the court is proper. See *Helmick v. Rankin,* 166 Pa. Super. 189, 193, 70 A.2d 362, 364 (1950); *Beisel v. Monessen S.W. Railway Co.,* 121 F. Supp. 604, 606 (E.D. Pa. 1954), affd. 218 F.2d 273 (3d Cir. 1955). When the bolt was presented to a witness to explain its use, we simply examined it and asked how it worked. This was informational for both the court and the jury.

We permitted a police officer to testify that he believed that at the time Donna's car hit the tire it was stationary. The officer, who did not witness the accident, testified concerning his background and training in accident investigation. He based his opinion on his observations at the accident scene, including marks on the highway, location of the vehicles and damages to Donna's car. See *Lesher v. Henning*, 302 Pa. Super. 508, 512-3, 499 A.2d 32, 34 (1982). The weight to be given to his testimony under the circumstances was for the jury. *Klinger v. Straw,* 74 Dauphin 304, 308. (1960). He did not testify as to the cause of the accident which was the case in *Reed v. Hutchinson,* Pa. Super. , 480 A.2d 1096 (1984). Even if admitting the trooper's opinion was error, it was harmless. *Fish v. Gosnell,* Pa. Super. , 463 A.2d 1042, 1046 (1983).

Plaintiffs also state we erred in failing to instruct the jury that it may reject an expert opinion even though it is not contradicted. That claim is factually inaccurate. We told the jury they could accept or reject such testimony as in the case of another witness, giving to it such weight as they thought it was entitled to and that they were not bound by it.

The plaintiffs also complain that we did not charge on the doctrine of res ipsce loquitur, but we did. Our recollection is that we gave the charge plaintiffs requested. But it would make no difference whether we did or not, because the jury found that the defendants were negligent.

Book Volume 789, Page 459, conveyed to Mark A. Lawyer and Penny Lawyer, his wife.

IMPROVED with a one-story frame siding dwelling house containing seven rooms, one bath and a partial basement. The property has a septic system and spring water. There is also one outbuilding. The street address of the property is 8497 Fort McCord Road, Chambersburg, Pennsylvania.

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SALE NO. 10
Writ No. AD 1985-216 Civil 1985
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—vs—
D. Michael Grove and
Carolyn Jean Grove
Atty: Robert C. Schollaert

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LEGAL NOTICES, cont.

TERMS

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The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, December 23, 1985 at 4:00 P.M., E.S.T. Otherwise all money previously paid will be forfeited and the property will be resold on Friday, December 27, 1985 at 1:00 P.M., E.S.T. in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

11-15, 11-22, 11-29

On the damage issue, which the jury never reached and therefore doesn't require consideration in this opinion, we nevertheless note that it is claimed we improperly limited testimony concerning Donna's earliest musical training. We permitted testimony about her recent training, and this is the testimony that was relevant and related to the case in hand. The introduction of evidence is within the discretion of the trial court. *Wolfe v. Pickell,* 204 Pa. Super. 541, 544, 205A.2d 634, 635 (1964). Remoteness of evidence is a factor to be considered. *Whistler Sportswear, Inc. v. Rullo,* 289 Pa. Super. 230, 242, 433 A.2d 40, 46 (1981).

Finally it is argued that the verdict was so contrary to the evidence and illogical as to shock one's sense of justice, because (1) the evidence was clear that Donna was injured and that she had medical expenses, (2) that Michael could not be contributorily negligent and (3) the jury did not find the nonuse of seat belts should result in reduction of damages.

The first of these contentions is answered when we note again the jury apparently did not reach the damage phase. The jury's verdict as to Michael can be understood if they regarded Donna's negligence as being the cause of his injuries and, as to the third, the seat belt and other negligence issues have been discussed.

It would not be proper to presume that the verdict was based upon erroneous conclusions. Even if we assumed arguendo that we would have arrived at a different conclusion, that alone would not be sufficient for a new trial unless the verdict actually shocked our sense of justice. *Bertab, Inc. v. Fox,* supra, 79, 620, *Buck v. Scott Township,* supra, 694-5, which it did not.

ORDER OF COURT

February 8, 1985, the plaintiffs' motions for a new trial are denied.

MILLER V. CHAMBERSBURG HOSPITAL, C.P. Franklin County Branch, A.D. 1984-192

Malpractice - Punitive damages

1. A complaint seeking punitive damages in a tort action is legally insufficient if it merely avers that defendant's acts were outrageous or done with reckless indifference.