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Indiana: Failure to Wear Seatbelt Not Admissible in Personal Injury Case

Last week, the Court of Appeals of Indiana has handed down an insightful decision addressing whether evidence showing that a person injured in an automobile accident had not been wearing a seatbelt could be admissible to prove contributory negligence. While it is true that Indiana courts have considered the issue of apportioning fault to an injured person who failed to wear a seatbelt, that issue had not been addressed in the context of contributory negligence since the enactment of the Indiana Seatbelt Act. The case–*City of Fort Wayne v. Parrish*–gives us an opportunity to discuss both its specific holding and, more generally, the issue of using evidence of whether a person wore a seatbelt.

The facts of the case are very straightforward: "a vehicle operated by a Fort Wayne Police Department officer collided with" another vehicle. Miss Parrish–the plaintiff in the case–was a passenger in the non-police car. She "was not wearing a seatbelt at the time of the collision[.]" As a result, she was thrown from the vehicle and injured. Miss Parrish filed suit against the city of Fort Wayne for the officer's negligence. Prior to trial, her attorney filed a motion in limine–a preliminary ruling on the admissibility of evidence–to exclude evidence that Miss Parrish was not wearing her seatbelt. The trial court granted the motion and Fort Wayne appealed. The appeal squarely addressed a single question: Is the failure to wear a seatbelt a basis for a defense of contributory negligence?

Before we dive into the answer, let's first unpack the question itself. At the

core of our discussion is the concept of contributory negligence. We have previously discussed the distinction between the classic legal doctrine of contributory negligence and the modern comparative fault standard. In short, at common law, a person seeking to recover for his injuries could be barred any recover at all if he was even the slightest bit a factor in his own injuries. This was an extremely harsh standard that permitted otherwise culpable people to sidestep liability. Indiana adopted the Comparative Fault Act in 1983, becoming effective in 1985. As the Indiana Supreme Court has recognized:

> In abrogating this harsh rule, the Act allows recovery but reduces such recovery in proportion to any fault of the plaintiff which contributed to the damages. The contributory negligence defense is partially retained as the Act also generally precludes any recovery to a plaintiff with more than 50 percent fault. In furtherance of these objectives, the Act establishes a mechanism by which the factfinder is required to specifically determine the relative degree of the plaintiff's fault with respect to others. This proportional allocation of fault is the means by which the Act's objectives are reached, not the ends to which it aspires.

To illustrate how the two different standards work, let us look at a couple hypothetical scenarios. Scenario 1: John is driving his car north on College Avenue. John receives a text message and looks down at his phone for five seconds. While John is looking at his phone, Steven, driving the opposite direction, swerves to miss a pothole and crashes into John. If John had not looked at his phone, he would have seen Steven and been able to stop in time to avoid the collision. John sues Steven and the case goes to trial. The jury finds in favor of John and finds that John was 5% at fault for the accident and has suffered $100k in damages. Applying the contributory negligence standard, that 5% allocation of fault to John is sufficient to render a verdict in favor of Steven, leaving John with no recovery. Under the comparative fault standard, John may recover against Steven, but the damages amount is reduced proportionately to the allocation of fault. Thus, because John is 5% responsible for the accident, he can only recover 95% of his damages–id est $95k.

Scenario 2. Andrea is driving south on Alabama Street when she decides to listen to a different song on her mp3 player. While sorting through her songs, Norman rolls through a stop sign to turn left to head south on Alabama. In so doing, Norman pulls out in front of Andrea. Andrea, not seeing Norman in time, fails to apply the brakes in time to avoid the collision. Andrea sues Norman. At trial, the jury finds Andrea 51% at fault and Norman 49%. Here, under the contributory negligence standard, of course Andrea is barred from recovery. But, even under the comparative fault standard, she cannot obtain money from Norman. Conceptually,

this makes sense. Indeed, under this scenario, you can see that if Norman had sued Andrea for the accident, he would have been able to recover 51% of his damages from her.

Where things get slightly screwy is when the apportionment of fault is an even 50-50 split. Judge Margret G. Robb of the Court of Appeals of Indiana addressed the peculiarity of this scenario in an unpublished decision:

> I agree with the majority's statement of the applicable statutory provisions; however, I write separately to note that although Indiana Code section 34–51–2–7 states that a claimant fails to recover only if he is more than 50% at fault, it cannot have been the intent of the legislature that damages have to be awarded even when the parties are equally at fault. There are simply situations in which the negligence of two parties is so identical that neither should collect damages, and the statute as written does not allow for such situations. In such cases, the outcome is dependent upon a race to the courthouse: whoever is the first to file gets the benefit of the statutory provision in favor of the "claimant." We should not force defendants into creating an artifice by naming, for instance, a bystander who could have warned of an impending collision, as an anonymous nonparty in hopes some small percentage of fault will be assigned to a third party and "break the tie." In short, I concur with the result reached by the majority based upon the language of the statute, but would encourage the legislature to take a second look at the statute.

With that out of the way, we can now turn to the answer to today's question. At this point, you are probably rather confused as to why our question–Is the failure to wear a seatbelt a basis for a defense of contributory negligence?–discusses contributory negligence if the Comparative Fault Act has supplanted the common law doctrine of contributory negligence. The reason for your confusion is that the Comparative Fault Act has *largely* supplanted contributory negligence, but not universally so. Section 2 of the act–"This chapter does not apply in any manner to tort claims against governmental entities or public employees under IC 34-13-3."–specifically excludes application of the Comparative Fault Act to suits against governmental entities/employees. So, if the Act does not apply, then the only standard left is the common law contributory negligence standard, and so it is; Indiana law still applies the harsh contributory negligence standard with the government is a defendant.

Here, it was Fort Wayne's hope to rely on this contributory negligence standard to escape liability to Miss Parrish. Mind you, apportioning fault to a

passenger of a vehicle is an extremely difficult proposition on its own. A passenger has no operative control over the vehicle, and, barring highly unusual circumstances, should not be deemed responsible in any way for the accident. Thus, Fort Wayne found itself in an uphill battle. The only apparent argument for the city was to contend that Miss Parrish had a duty to wear her seatbelt and therefore, was negligent for not doing so. As we will see, the court disagreed. Before we get into the history of Indiana law on whether a driver had a duty to wear a seatbelt, let us consider for a second the logic and sense behind the argument that a person's recovery should be diminished due to the failure to wear a seatbelt.

The argument is not a novel one. It certainly has superficial appeal: why should a person be held liable for injuries to another driver that could have been at least diminished if the other driver wore her seatbelt? After all, there is an Indiana statutory requirement that drivers and passengers wear seatbelts. Let's look at what the comparative fault and contributory negligence standards address. They address causation, not injury. That is, each seeks to determine what role the litigants played in causing the injury-causing event. Though it plays out to impact the amount of damages recoverable–due to the amount recoverable tracking the apportionment of fault, thereby making an injured person responsible for his own mistakes–whether certain injuries are even recoverable as damages is addressed under two separate concepts: the foreseeability of the harm/injury and whether the injured person had a duty to mitigate that harm. The Indiana Supreme Court has noted:

> He argues that under the Comparative Fault Act, whether a plaintiff failed to mitigate damages is an allocation of fault issue. . . . [T]his Court [has] ruled that mitigation of damages is an affirmative defense that may reduce the amount of damages a plaintiff is entitled to recover, but does not affect the ultimate issue of liability.

Thus, whether a person wears a seatbelt is not something that creates the accident. Rather, it is a decision that impacts the injuries sustained by the injured person.

So, if failure to wear a seatbelt goes to the issue of damages, not fault, then is failure to wear a seatbelt, conceptually, a basis to diminish recovery? For an injury to be compensable, it must be foreseeable. Indiana has recognized: "it is clearly foreseeable that an automobile passenger might fail to wear a seatbelt." So injuries from not wearing a seatbelt are foreseeable, but is the failure to wear a seatbelt a failure to mitigate damages–the duty to take steps to minimize the harm to yourself?

I remember discussing this issue with another lawyer while judging the 2013

National High School Mock Trial Championship. The fellow lawyer, speaking on the fact pattern of the competition, asserted the point to me that the plaintiff had failed to mitigate its damages by not procuring insurance. My response was that there was no contractual or statutory duty to have insurance in that case. Consequently, what he was arguing was a pre-injury duty to mitigate damages. As Judge Richard A. Posner has succinctly stated, "The duty to mitigate arises after the plaintiff has been injured, the duty of care before." Looking at it from this perspective, it becomes clear that the failure to wear a seatbelt is not a failure to mitigate damages, because the failure necessarily occurred before the injury. A minority of courts has, however, abandoned the requirement that injury pre-date the duty to mitigate in the seatbelt context.

Most notably, in *Spier v. Barker*, New York's highest court adopted the view that failure to wear a seatbelt is a failure to mitigate damages:

> As Prosser has indicated, the plaintiff's duty to mitigate his damages is equivalent to the doctrine of avoidable consequences, which precludes recovery for any damages which could have been eliminated by reasonable conduct on the part of the plaintiff. Traditionally both of these concepts have been applied only to postaccident conduct, such as a plaintiff's failure to obtain medical treatment after he has sustained an injury. To do otherwise, it has been argued, would impose a preaccident obligation upon the plaintiff and would deny him the right to assume the due care of others. We concede that the opportunity to mitigate damages prior to the occurrence of an accident does not ordinarily arise, and that the chronological distinction, on which the concept of mitigation damages rests, is justified in most cases. However, in our opinion, the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages Prior to the accident. Highway safety has become a national concern; we are told to drive defensively and to 'watch out for the other driver'. When an automobile occupant may readily protect himself, at least partially, from the consequences of a collision, we think that the burden of buckling an available seat belt may, under the facts of the particular case, be found by the jury to be less than the likelihood of injury when multiplied by its accompanying severity.

Shortly after *Spier*, the Court of Appeals of Indiana specifically rejected *Spier* and its ilk:

> A growing minority of courts have determined that although failure to use seat belts does not constitute contributory negligence, evidence of non-use can properly be considered as to mitigation of damages or

avoidable consequences.

> Such a theory seems, in effect to impose liability for non-use of seat belts under the guise of failure to mitigate damages for an act (omission) that occurred prior to the event, which is inconsistent with mitigation which occurs after the event.
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> While the law on this subject is in a state of transition, the majority of courts considering the question reject the non-use of seat belts as a factor in the determination of liability or damages.
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> The rationale usually is that there is no common law duty to wear seat belts and no duty will be imposed absent a statutory requirement . . . and the defendant takes the plaintiff as he finds him.
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> [I]t is the prerogative of the Legislature to determine if non-use of seat belts is a basis for liability.

At last, we come back to *Fort Wayne v. Parrish* from last week. At the time the court of appeals rejected *Spier*, Indiana did not have a statute mandating the use of seatbelts, only that they be included in all new cars sold. Since then, Indiana has enacted the Seatbelt Act mandating seatbelt usage. Perhaps surprisingly, the Act also states: "Failure to comply with section 1, 2, or 3.1(a) of this chapter does not constitute fault under [the Comparative Fault Act] and does not limit the liability of an insurer." Consequently, in *Parrish*, "[b]oth parties acknowledge[d]. . . a person's failure to wear a seatbelt or noncompliance with the Seatbelt Act cannot be used to prove the negligence of parties that are subject to the Comparative Fault Act." But, remember, the case is subject to the contributory negligence standard, so the case was not open and shut.

In beginning the analysis, the court recognized prior cases that had rejected the use of seatbelt evidence even against the contributory negligence standard. However, each such case predated enactment of the Seatbelt Act. Remember, the court of appeals had previously said the decision on liability for non-use of seat belts is the prerogative of the Legislature. It was Fort Wayne's position that the legislature had done just that with the Seatbelt Act, even if it was only in the context of contributory negligence cases. The argument was unavailing. In the absence of a clear statutory indication, the common law remains unaltered. The Seatbelt Act was certainly not clear that it was establishing that seatbelt evidence could be used in contributory negligence cases. Indeed, it is silent as to contributory

negligence. Utilizing the principle of statutory interpretation that statutes acting in derogation of the common law are to be strictly construed, the court of appeals rejected Fort Wayne's argument.

Consequently, the court of appeals affirmed the trial court's decision to grant a motion in limine to exclude evidence that Parrish did not wear her seatbelt. Further, the case, barring transfer to the Indiana Supreme Court–an unlikely scenario–closes the last remnant of a loophole through which seatbelt evidence might have been admitted in a negligence case in Indiana.

Join us again next time for further discussion of developments in the law.

Sources

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- Indiana Comparative Fault Act, codified at Ind. Code ch. 34–51–2.
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