St. Mary's Law Journal

Volume 1 | Number 1 Article 14

3-1-1969

Tort Action Arose out of Automobile Collision in Which Failure of Plaintiff to Wear Seat Belts Gave Rise to a Concept of Mitigation of Damages Rather Than Contributory Negligence.

Clifford I. Weinstein

for a "bastardy proceeding." The primary purpose of such a proceeding is to establish the paternity of the father.

Thus the problem in Texas centers around the lack of a statute which would allow the child to bring a judicial proceeding to establish paternity of the alleged father. The courts have not allowed the child to establish paternity of the father by bringing one of the aforementioned actions for recovery. Establishment of paternity is a prerequisite to allowing the court to establish a relationship between the child and the father upon which the illegitimate child could base his claim to those rights enjoyed by his legitimate brother and afford him equal protection of the laws as prescribed by the Texas and United States Constitution.[39]

Miles J. Mullin

AUTOMOBILES—DAMAGES—CONTRIBUTORY NEGLIGENCE—MITIGATION—TORT ACTION AROSE OUT OF AUTOMOBILE COLLISION IN WHICH FAILURE OF PLAINTIFF TO WEAR SEAT BELTS GAVE RISE TO A CONCEPT OF MITIGATION OF DAMAGES RATHER THAN CONTRIBUTORY NEGLIGENCE. *Sonnier v. Ramsey*, 424 S.W.2d 684 (Tex. Civ. App.—Houston 1968, writ ref'd, n.r.e.).

This action arose from a collision between an ambulance in which the plaintiff was a "side passenger" and a truck driven by the defendant. Upon impact the plaintiff was thrown from the vehicle and seriously injured when the wheels of the truck ran over his legs. The defendant pleaded that plaintiff's failure to wear seat belts was contributory negligence and thus a bar to the suit. Trial court rendered judgment for the defendant. Held—*Reversed and remanded.* Although the case was reversed on other grounds, the court inferred by way of *dicta* that such failure to wear seat belts went to the question of damages and not liability; this failure to wear seat belts mitigated the

39 TEX. CONST. art. I, § 3; U.S. CONST. amend. XIV, § 1.

damages suffered by the plaintiff but did not bar the suit as would contributory negligence.

Comparative negligence is not allowed in states that follow the rule of contributory negligence. The contributory negligence of the plaintiff, however, will sometimes reduce the amount of his recovery. This doctrine is applied when the plaintiff is under a duty to mitigate the damages caused by the defendant. The doctrine may be used to show that the damages suffered by the plaintiff should be reduced.[1] The doctrine of mitigation is anything which tends to show: (1) plaintiff has no damages; (2) the claimed damage is not as large as the plaintiff asserts; (3) all or part of the plaintiff's damages could reasonably have been avoided by the plaintiff. This last category involves the doctrine of avoidable consequences.[2]

Avoidable consequences is a doctrine of mitigation. It precludes recovery for damages flowing from reasonably avoidable consequences.[3] This is expressed as either a duty on the part of the plaintiff to minimize his damages, or as an obligation to take reasonable action to avoid enhancing the damages caused by the defendant.[4] This defense is distinguishable from that of contributory negligence. Although both doctrines are temporal in nature, contributory negligence occurs either *before* or *during* the wrongful act or omission of the defendant.[5] Avoidable consequences arise *after* the wrongful act of the defendant.[6] The rule states that if some of the plaintiff's damages could have reasonably been avoided by him, they cannot be recovered.[7] A failure to minimize such damages under avoidable consequences will reduce the amount recoverable.

Sams v. Sams[8] discussed the question of whether or not failure to wear seat belts is contributory negligence. The South Carolina Su-

---

1 Prosser, *Torts*, § 64, at 433 (3d ed. 1964).

2 Galveston, H. & S.A. Ry. Co. v. Zantzinger, 92 Tex. 365, 48 S.W. 563, 566 (1898); Moulton v. Alamo Ambulance Service, Inc., 414 S.W.2d 444 (Tex. Sup. 1967).

3 22 AM. JUR. 2d, *Damages* § 200, at 280.

4 RESTATEMENT OF TORTS, § 918,

> Avoidable consequences. (1) a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care *after* the commission of the tort. . . ;

Southport Transit Company v. Avondale Marine Ways, 234 F.2d 947 (5th Cir. 1956); Western Union Telegraph Co. v. Sweeney, 106 S.W.2d 663 (Tex. Civ. App.—Eastland, 1934), *aff'd*, 106 S.W.2d 670 (Tex. Com'n App. 1934, opinion adopted).

5 Kavanagh v. Butorac, 221 N.E.2d 824 (1966); Western Union Telegraph Co. v. Sweeney, 106 S.W.2d 663 (Tex. Civ. App.—Eastland, 1934), *aff'd*, 106 S.W.2d 670 (Tex. Com'n App. 1934, opinion adopted).

6 Cases cited note 5 *supra*.

7 Moulton v. Alamo Ambulance Service, Inc., 414 S.W.2d 444 (Tex. Sup. 1967); Carroll Springs Distilling Co. v. Schnepfe, 111 Md. 420, 431, 74 A. 828 (1909); Atchinson, T. & S.F.R. Co. v. Jones, 110 Ill. App. 626 (1903); Southern R. Co. v. Poetker, 46 Ind. App. 295, 91 N.E. 610; Gulf, C. & S.F.R. Co. v. Reed, 22 S.W. 283 (Tex. Civ. App. 1893, no writ); Prosser, Torts, § 64, 433 (3d ed. 1964).

8 Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1967).

preme Court held it error, in an action against a driver of an automobile, to strike from the answer a specification of contributory negligence. The passenger rode in the automobile without strapping her seat belt. The issue raised by the defense was not one for decision upon the pleadings, but rather a question of fact which should have been decided in the light of all the facts and circumstances.[9] *Bentzler v. Braun*[10] reasoned that when seat belts are available, the failure to use them may be found to be contributory negligence when there is positive evidence that such failure was a producing cause of the injuries. The Court felt that although no statute required their use, there was a common law duty requiring their use. *Moore v. Boone*[11] said that in states following the doctrine of contributory negligence, a plaintiff's negligence which is a proximate cause of the original injury will bar all recovery, even though the plaintiff's negligence was comparatively slight. In the unreported Texas district court case of *Vernon v. Droeste*,[12] recovery was denied a plaintiff not wearing his seat belt. Plaintiff received face, elbow and knee cuts in a head-on collision. An expert testified that had the plaintiff been wearing his seat belt, he would not have hit the windshield. The jury found contributory negligence and that 95 per cent of his injuries would have been avoided had he worn a seat belt. The finding of contributory negligence in the district court followed an opposite line of reasoning from *Sonnier v. Ramsey*.[13] The Texas court of civil appeals in *Valdez v. Yellow Cab Co.*[14] stated that in a personal injury or death action, the contributory negligence of the plaintiff or decedent is an affirmative defense and will avoid liability of the defendant, though he is guilty of one or more negligent acts proximately causing injuries or death.

Brown v. Kendrick[15] is contrary to the cases which consider failure to wear seat belts to be contributory negligence. It held that the refusal to permit defendant automobile owner to offer evidence that a passenger failed to use seat belts, as a defense to the gross negligence of the driver of defendant's automobile, was not error. The court in so holding stated:

> We think the trial court properly stated the correct conclusion when he said, in effect, that defendant had not shown, *except by conjecture*, that the use of the seat belts would have prevented the

---

9 *Id.*

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

11 Moore v. Boone, 231 N.C. 494, 57 S.E.2d 783 (1950).

12 Vernon v. Droeste (Dist. Ct., Brazos County, Tex., 85th Jud. Dist., 1966).

13 Sonnier v. Ramsey, 424 S.W.2d 684 (Tex. Civ. App.—Houston, 1968, writ ref'd n.r.e.).

14 Valdez v. Yellow Cab Co., 260 S.W.2d 715 (Tex. Civ. App.—San Antonio, 1953, no writ).

15 Brown v. Kendrick, 192 So. 2d 49 (Dist. Ct. App. Fla. 1966); *accord*, Lawrence v. Westchester Fire Insurance Co., 213 So. 2d 784 (Ct. of App. of La. 1968).

> injury complained of. Certainly, as pointed out by the appellee, the plaintiff's failure to fasten her seat belt was *not* such negligence as to contribute to the occurrence of the accident, nor to be the proximate contributing cause of the injury in the absence of a showing that the accident could have been avoided in the absence of such a negligent act.[16]

In *Kavanagh v. Butorac*[17] the Indiana Court of Appeals concluded that it could not say, as a matter of law, that failure to wear seat belts is contributory negligence. A New York court held in *Dillon v. Humphreys*[18] that the passenger's failure to use seat belts did not give rise to an inference of contributory negligence. Minnesota, Tennessee and Virginia are other jurisdictions that specify that a plaintiff's failure to use seat belts shall not be deemed contributory negligence.[19] Similar holdings in other states show a general trend to allow plaintiffs to recover in spite of the failure to wear seat belts.[20]

In *Miller v. Miller*[21] the Court said it would be a harsh and unsound rule that would deny all recovery to the plaintiff, whose mere failure to buckle his seat belt in no way contributed to the accident, and exonerate the active tort-feasor, but for whose negligence the plaintiff's omission would have been harmless. The plaintiff is under no duty to buckle his seat belt, nor to anticipate the negligence of the defendant. It has been held that failure to anticipate a defendant's negligence is not contributory negligence.[22] Such failure to wear a seat belt has been held not to constitute negligence *per se* even when the belts are required to be installed under state law.[23]

Two concepts have developed since the *Sams*[24] decision in 1966. One view is that the plaintiff's failure to use seat belts is a proximate cause of his injury.[25] This view bars recovery by the plaintiff on the theory of contributory negligence. The other view is that the failure to use seat belts, if a contributing cause of plaintiff's injury, should bring about a determination of the percentage of the injuries caused by such failure.[26] The recovery is then reduced by that percentage. Such a theory is compatible to jurisdictions employing the theory of comparative negligence.[27] *Barry v. Coca-Cola Co.*[28] distinguishes between negli-

16 Brown v. Kendrick, 192 So. 2d 49, 51 (Dist. Ct. App. Fla. 1966).
17 Kavanagh v. Butorac, 221 N.E.2d 824 (App. Ct. Ind. 1966).
18 Dillon v. Humphreys, 288 N.Y.S.2d 14; *accord*, Noth v. Scheurer, 285 F. Supp. 81 (E.D. New York 1968).
19 16 De Paul L. Rev. 521 (1967).
20 *Id.* at 521.
21 Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).
22 McCulloch v. Horton, 105 Mont. 531, 74 P.2d 1 (1937).
23 Robinson v. Bone, 285 F. Supp. 423 (D.C. Ore. 1968).
24 Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966).
25 Annot., 15 A.L.R.3d 1428.
26 *Id.* at 1428.
27 Insurance Counsel Journal, Vol. 34, at 349, April 1967.

gence contributing to the accident and that contributing to the injuries sustained. If such negligence contributed to the injury, the court, upon sufficient evidence, will allow an apportionment of the damages. The Restatement of Torts[29] suggests that the plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a *substantial* factor in bringing about his harm and there is no rule restricting his responsibility for it. The comment reads:

> Where the harm is single and indivisible, it is not apportioned between the plaintiff and the defendant, in the absence of a statute providing for such division of the damages upon an arbitrary basis. Where, however, there are distinct harms, or a reasonable basis is found for the division of a single harm, the damages may be apportioned, and the plaintiff may be barred only from recovery for so much of the harm as is attributed to his own negligence. Such apportionment is commonly made, under the damages rule as to avoidable consequences, where the plaintiff suffers an original injury, and his negligence consists in failure to exercise reasonable care to prevent further harm to himself. . . .
>
> Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues. There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation.

The instant case[30] indicates that although Texas is in line with states which follow the doctrine of contributory negligence, the court will allow apportionment of damages in seat belt situations. The court of civil appeals, by way of *dictum*, suggested a theory that the failure to wear a seat belt would reduce the damages recoverable by the plaintiff. The court refused to say whether or not there was a duty to wear a seat belt in Texas but indicated that in the future if there was such a duty, the plaintiff will be denied recovery *only* for those injuries which were the *proximate cause* of his failure to wear seat belts.

Judge Lynch in *Barry*[31] said the court could see many difficulties in producing effective expert testimony to establish evidence that the failure to use a seat belt was a substantial *contributing factor* increasing the harm which the plaintiff suffered. *Miller v. Miller*[32] dealt with this

---

28 Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

29 RESTATEMENT (SECOND) OF TORTS § 465, 510, "Causal relation between harm and plaintiff's negligence."

30 Sonnier v. Ramsey, 424 S.W.2d 684 (Tex. Civ. App.—Houston, 1968, writ ref'd n.r.e.).

31 Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

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

issue. In any given collision, no physician can say exactly what injuries would have been suffered had the victim been wearing a seat belt as compared to those he suffered without it. There are too many unknown variables such as exact number, degree, direction, duration and kinds of forces that might have been acting in any given accident to answer the question with any accuracy.[33] In *Lipscomb v. Diamiani*[34] the court reasoned that:

> It is possible for reasonable men to analyze logically the variables presented by the issues of lookout and control, but it is extremely difficult to analyze the variables presented in failing to buckle a seat belt upon entering an automobile. . . . To ask a jury to do so is to invite verdicts on prejudice and sympathy contrary to the law. It is an open invitation to unnecessary conflicts and tends to degrade the law by reducing it to a game of chance.

Bentzler v. Braun[35] stated:

> In the absence of credible evidence by one qualified to express the opinion of how the use or nonuse of seat belts would have affected the particular injuries, it is improper for the court to permit the jury to speculate the effect seat belts would have had.

When evidence can be produced to identify the injury the plaintiff sustained because of his failure to use seat belts, the jury may apportion the damages under the doctrine of avoidable consequences.[36] Under this doctrine, if the plaintiff fails to exercise reasonable care to avoid further harm from the damage caused by the defendant, he will be precluded from recovery of those consequences which he could have avoided but did not.[37] *Lipscomb v. Diamiani*[38] refutes the doctrine of avoidable consequences in seat belt cases. The seat belt situation does not fit the doctrine of avoidable consequences because the failure to fasten the seat belt occurred *before* the plaintiff's injury.[39] *Barry v. Coca-Cola Co.*[40] also rejects the doctrine of avoidable consequences in a seat belt situation because the doctrine arises only when the plaintiff's carelessness occurs *after* the defendant's legal wrong has been committed. Cases have distinguished the doctrine of avoidable consequences from contributory negligence many times. Avoidable consequences arise after the injury, while contributory negligence takes

33 16 AM. JUR. *Proof of Facts*, "Seat Belt Accidents," § 43.
34 Lipscomb v. Diamiani, 226 A.2d 914, 917 (Superior Ct. Del. 1967).
35 Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626, 640 (1967).
36 RESTATEMENT OF TORTS, § 918, at 601.
37 Moulton v. Alamo Ambulance Service, Inc., 414 S.W.2d 444 (Tex. Sup. 1967).
38 Lipscomb v. Diamiani, 226 A.2d 914 (Superior Ct. Del. 1967).
39 *Id.* at 917.
40 Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

place before the injury.[41] Under the doctrine of avoidable consequences if no division of the damages can be made, the plaintiff's subsequent negligence will bar recovery.[42] If a division can be made in some limited number of situations, the plaintiff's unreasonable conduct *although it is prior to or contemporaneous with* the defendant's conduct may be found to have caused only a separable part of the damage. Even though it is called contributory negligence, an apportionment will be made.[43] A more difficult problem is presented when the plaintiff's prior conduct is found to have played no part in bringing about an impact or accident, but rather to have aggravated the ensuing damage.[44] Courts in Iowa and Kansas have apportioned damages, holding that plaintiff's recovery will be reduced to the extent that they have been aggravated by his own negligence.

> Cases will be infrequent, however in which the extent of aggravation can be determined with any reasonable degree of certainty, and the court may properly refuse to divide the damages upon the basis of mere speculation.[45]

The court said in *Lipscomb*:[46]

> This court is not convinced that the extension of the doctrine of avoidable consequences to the seat belt situation is desirable. Indeed, the seat belt situation does not fit neatly into the doctrine at all because the alleged negligent act happens before any injury.

They agreed with *Kavanagh v. Bulorac*[47] as to the temporal elements of the doctrine of contributory negligence and the doctrine of avoidable consequences. Jurisdictions which apportion damages do not use mitigation principles in seat belt cases, when the injury could be separated from the plaintiff's failure to wear seat belts and the damage caused is a direct result of the defendant's negligence. This is true because the only mitigation principle applicable would show that a part of the plaintiff's damages should reasonably have been avoided by him; such a principle involves the doctrine of avoidable consequences. Following the reasoning in *Lipscomb* and other cases,[48] avoidable consequences is to be applied *after* injury, not *before.*

---

41 Socony Vacuum Oil Co. v. Marvin, 313 Mich. 528, 21 N.W.2d 841 (1946); Bailey v. J.L. Roebuck Co., 135 Okl. 261, 275 P. 329 (1929); Dippold v. Cathlamet Timber Co., 111 Or. 199, 225 P. 202 (1924); Armfield v. Nash, 31 Miss. 361 (1856); McCormick, *Damages*, § 33 (1935).

42 Atchinson, T. & S.F.R. Co. v. Merchants' Live Stock Co., 293 F. 987 (8th Cir. 1923).

43 Prosser, *Torts* § 64, at 433 (3d ed. 1964).

44 *Id.* at 433.

45 *Id.* at 434.

46 Lipscomb v. Diamiani, 226 A.2d 914, 917 (1967).

47 Kavanagh v. Bulorac, 221 N.E.2d 824 (1966).

48 RESTATEMENT (SECOND) OF TORTS § 918; Failure of a plaintiff to anticipate negligence

It appears that the courts have applied a new concept to the doctrine of mitigation. This must be the result in jurisdictions when contributory negligence is adhered to in order to avoid the possibility of applying a comparative negligence doctrine, which such jurisdictions absolutely reject. However, for lack of a better name for the new concept, the Texas court chose the term "mitigation." Such a name for a principle of damages which is analogous to the principle suggested by the Texas court caused some confusion in the *Sonnier* case. Through the established principles of mitigation, the defendant was unable to effectually apply those principles to the present situation. This new concept would expand the doctrine of mitigation in that it would come into existence before the injury.

Although the new concept in Texas is sound, the court in *Sonnier* neglected to indicate a test for the apportionment of damages. As indicated in *Barry*, an attempt by the jury to apportion plaintiff's damages which were due to his failure to use seat belts, as against those injuries he would have suffered if the seat belts were used, would be the purest kind of speculation in the absence of expert testimony to such effect. In *Brown Drilling Co. v. Nieman*[49] whether or not the failure to use seat belts was negligent conduct and a substantial factor in producing injuries was a jury question. The court went on to say that, in the absence of credible evidence by one qualified to express opinion on how the use or non-use of automobile seat belts would have effected the occupant's particular injuries, it is improper for the court to permit jury speculation of the effect seat belts would have.

The evidence produced in the instant case was insufficient to determine what amount of damage the failure to wear seat belts produced. It would have been difficult to ascertain the extent of injuries sustained by the plaintiff's failure to wear a seat belt and those injuries sustained from the impact between the ambulance and the truck had he remained in the ambulance after impact. It seems that a jury would be hypothesizing if they were allowed to decide how much of the damage was independently caused by the failure to use a seat belt. Certainly the defendant should be required[50] to produce sufficient proof that a certain amount of damage would have been reduced had the plaintiff been wearing a seat belt. The court may refuse to apportion the plaintiff's damages on the basis of mere speculation by the jury.

---

on the part of defendant is *not* contributory negligence, McCulloch v. Horton, 105 Mont. 531, 74 P.2d 1 (1937); McCormick, *Damages*, § 33 (1935); Moulton v. Alamo Ambulance Service, Inc., 414 S.W.2d 444 (Tex. Sup. 1967); Smith v. International Printing P. & A. Union, 190 S.W.2d 769 (Tex. Civ. App.—Dallas, 1945), reversed on other grounds, 145 Tex. 399, 198 S.W.2d 729 (1945); Bailey v. J.L. Roebuck Co., 135 Okl. 216, 275 P. 329 (1929); Socony Vacuum Oil Co. v. Marvin, 313 Mich. 528, 21 N.W.2d 841 (1946).

[49] 418 S.W.2d 337 (Tex. Civ. App.—Eastland, 1967, writ ref'd n.r.e.); Bentzler v. Braun, 34 Wis. 2d. 362, 149 N.W.2d 626 (1967).

[50] Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

Sonnier has applied a possible approach to a problem which is certain to arise in the future. The *Sonnier* concept has impliedly answered the question of how Texas will treat the failure of a plaintiff to wear a seat belt.

Clifford I. Weinstein