St. John's Law Review

Volume 57, Winter 1983, Number 2 Article 12

Plaintiff's Failure to Use Available Seatbelt May Be Considered as Evidence of Contributory Negligence When Nonuse Allegedly Causes the Accident

Craig Noble Tuoma

trial,[189] so too should they be admonished to refrain from independent experimentation that might affect, in any way, their perception of material issues.

Brenda Eng Hom

Plaintiff's failure to use available seatbelt may be considered as evidence of contributory negligence when the nonuse allegedly causes the accident

Three general approaches have been developed to determine the effect that nonuse of an available seatbelt has upon a plaintiff's recovery in an action for personal injuries suffered in a motor vehicle accident.[190] New York has taken the position that although

---

[189] CPL § 270.40 (1971). Section 270.40 mandates that preliminary instructions relating to jury misconduct be given to the jury. *Id.* The statute provides that

> [s]uch instructions must include, among other matters, admonitions that the jurors may not converse among themselves or with anyone else upon any subject connected with the trial; that they may not read or listen to any accounts or discussions of the case reported by newspapers or other news media; that they may not visit or view the premises or the place where the offense or the offenses charged were allegedly committed or any other premises or place involved in the case; and that they must promptly report to the court any incident within their knowledge involving an attempt by any person improperly to influence any member of the jury.

Id. It is suggested that the statute be amended to include express references to independent juror experimentation and juror conduct that reasonably may bear upon material issues.

[190] Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974). One of the three approaches to the seatbelt defense is the negligence per se approach, which posits that in a personal injury action arising out of an automobile accident, in a jurisdiction that has enacted a seatbelt installation statute, the plaintiff who failed to use a seatbelt will be considered contributorily negligent as a matter of law. *See* Comment, *The Seat Belt Defense: A New Approach*, 38 FORDHAM L. REV. 94, 97 (1969) [hereinafter cited as Fordham Comment]; Comment, *The Seat Belt Defense—A Valid Instrument of Public Policy*, 44 TENN. L. REV. 119, 122 (1976). Notably, no jurisdiction has accepted the negligence per se approach, *see, e.g.*, Remington v. Arndt, 28 Conn. Supp. 289, 291, 259 A.2d 145, 146 (Super. Ct. 1969); Cierpisz v. Singleton, 247 Md. 215, 227, 230 A.2d 629, 635 (1967); Miller v. Miller, 273 N.C. 228, 230, 160 S.E.2d 65, 68 (1968), since there exists no installation statute which mandates that seatbelts be worn, Comment, *supra*, at 122 & n.16; *see* N.Y. VEH. & TRAF. LAW § 383 (McKinney 1970) (requires that seatbelts be installed in every automobile manufactured after 1967, but does not require their use).

Another approach to the seatbelt defense is common-law contributory negligence, which is premised upon the belief that a reasonably prudent automobile occupant would exercise reasonable care for his own safety, and thus would use an available seatbelt. *See* Fordham Comment, *supra*, at 97. The contributory negligence approach has been adopted by a small number of jurisdictions. *See, e.g.*, Harlan v. Curbo, 250 Ark. 610, 612, 466 S.W.2d 459, 460-61 (1971); Truman v. Vargas, 275 Cal. App. 2d 976, 981, 80 Cal. Rptr. 373, 377 (Ct. App. 1969); Bentzler v. Braun, 34 Wis. 2d 362, 385, 149 N.W.2d 626, 639 (1967). Of the courts

nonuse of a seatbelt should not be considered in apportioning liability, it nevertheless may be evaluated in determining the amount by which the plaintiff's damage recovery will be reduced.[191] It has been unclear, however, whether this approach should be followed in cases where failure to use a seatbelt is an alleged cause of the accident.[192] Recently, in *Curry v. Moser,*[193] the Appellate Division, Second Department, held that a plaintiff's nonuse of an available seatbelt may be considered as evidence of contributory negligence when such nonuse is an alleged proximate cause of the accident.[194]

In *Curry,* the plaintiff was seated in the front passenger side of the defendant Moser's vehicle[195] as it made a left turn onto a four-lane thoroughfare.[196] During the turn, the front passenger

---

that have considered the contributory negligence approach, most have rejected it. *See, e.g.,* McCord v. Green, 362 A.2d 720, 722 (D.C. 1976); Placek v. Sterling Heights, 52 Mich. App. 619, 622, 217 N.W.2d 900, 901 (Ct. App. 1974); Robinson v. Lewis, 254 Or. 52, 55, 457 P.2d 483, 485 (1969).

The third approach to the seatbelt defense has been referred to as both mitigation of damages and avoidable consequences. Fordham Comment, *supra,* at 99. This rule, which is very similar to the doctrine of contributory negligence, *see* W. PROSSER, *supra* note 64, § 65, at 422-23, "comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages," *id.* § 65, at 423; *see* Note, *Seat Belt Legislation and Judicial Reaction,* 42 ST. JOHN'S L. REV. 371, 382 (1968). Thus, some commentators have argued that the avoidable consequences approach is inapplicable to seatbelt defense cases, because the failure to make use of a seatbelt occurs before the legal wrong has occurred. *See* Kleist, *The Seat Belt Defense—An Exercise in Sophistry,* 18 HASTINGS L.J. 613, 620-21 (1967).

[191] *See* Spier v. Barker, 35 N.Y.2d 444, 449-50, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974). In adopting the avoidable consequences approach, the *Spier* Court stated that

> nonuse of an available seat belt . . . is a factor which the jury may consider . . . in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain. However, . . . the plaintiff's nonuse . . . should be strictly limited to the jury's determination of the plaintiff's damages and should not be considered by the triers of fact in resolving the issue of liability.

Id. (citation omitted).

[192] *See* 35 N.Y.2d at 451 n.3, 323 N.E.2d at 168 n.3, 363 N.Y.S.2d at 921 n.3. After disapproving of the contributory negligence approach to the seatbelt defense, *see id.* at 450, 323 N.E.2d at 167, 363 N.Y.S.2d at 921, the *Spier* Court stated that "[n]ot involved in this case, and not considered, is an issue in which the failure to wear a seat belt is an alleged cause of the accident," *id.* at 451 n.3, 323 N.E.2d at 168 n.3, 363 N.Y.S.2d at 921 n.3.

[193] 89 App. Div. 2d 1, 454 N.Y.S.2d 311 (2d Dep't 1982).

[194] *Id.* at 2, 454 N.Y.S.2d at 312.

[195] *Id.* at 3, 454 N.Y.S.2d at 312. The plaintiff was sitting sideways in her seat, conversing with another passenger who was seated in the rear portion of the vehicle. *Id.* at 2, 454 N.Y.S.2d at 312.

[196] *Id.* Prior to reaching the thoroughfare in question, the vehicle in which the plaintiff was riding had negotiated several turns without encountering any problems. *Id.*

door of the defendant's car inexplicably opened,[197] and the plaintiff, who was not wearing the available seatbelt, fell out on to the roadway[198] and was struck by a car driven by the defendant, Cleary.[199] Prior to trial, the court denied the defendants' application to allow introduction of the seatbelt issue during the liability phase of the trial, as bearing upon the question of proximate cause.[200] During the damages phase of the trial, however, the Supreme Court, Trial Term, permitted the defendants to introduce evidence with respect to the plaintiff's failure to use the available seatbelt.[201]

On appeal, the Appellate Division, Second Department, unanimously reversed,[202] holding that evidence of a plaintiff's failure to use an available seatbelt may be considered for purposes of apportioning liability when the nonuse is an alleged cause of the accident.[203] Writing for the court, Justice Brown rejected as factually inapposite[204] the approach adopted in *Spier v. Barker*,[205] wherein

---

[197] *Id.* at 3, 454 N.Y.S.2d at 312-13. Evidence was introduced to the effect that the plaintiff was unable to open the passenger door of the vehicle on the morning of the accident and thus was forced to enter the car from the driver's side. *Id.*, 454 N.Y.S.2d at 313.

[198] *Id.* According to the plaintiff's testimony, she did not lean on the door while in the car, nor did she touch the interior part of the car as she fell out. *Id.*

[199] *Id.* The vehicle driven by the defendant, Cleary, had been directly behind the automobile in which the plaintiff was travelling as both came to a stop in the left turn lane at a traffic signal. *Id.* at 2, 454 N.Y.S.2d at 312. When the light turned green, both cars turned left, with the first vehicle proceeding into the left northbound lane, and the Cleary vehicle turning wider into the right northbound lane. *Id.* at 3, 454 N.Y.S.2d at 313.

[200] *Id.* At the close of the liability portion of the trial, without hearing any testimony on the failure of the plaintiff to wear her seatbelt, the jury found that the plaintiff and the two defendants were negligent. *Id.* The plaintiff Curry and the defendant Moser were each found 25 percent liable, while the defendant Cleary was found 50 percent liable. *Id.*

[201] *Id.* Expert witnesses testified on the defendants' behalf that had the plaintiff been using a seatbelt, she would not have fallen from the automobile and would not have sustained any injuries. *Id.* An expert witness also testified that the seatbelts in the car in which the plaintiff was riding were working properly. *Id.* The jury found that 100 percent of the plaintiff's injuries were sustained because of her nonuse of the available seatbelt, but nonetheless reduced its $50,000 award by only $15,000. *Id.* The jury further reduced the award by 25 percent based upon its comparative negligence findings. *Id.*

[202] Justice Brown, who wrote the unanimous opinion, was joined by Justices Rubin, Boyers, and Thompson.

[203] 89 App. Div. 2d at 2, 454 N.Y.S.2d at 312. In addition to holding that the plaintiff's failure to wear a seatbelt bore upon the question of liability, the Second Department concluded that due to the "intertwined" issues of liability and damages present in the case, a unified trial was necessary. *Id.* at 9, 454 N.Y.S.2d at 316.

[204] *See id.* at 7, 454 N.Y.S.2d at 315. The court in *Curry* stated that the facts in the case were "somewhat unique" insofar as the failure to wear a seatbelt not only caused the injury, but also caused the accident. *Id.*

[205] 35 N.Y.2d 444, 449-50, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974).

the Court of Appeals held that nonuse of an available seatbelt should go to reduce the plaintiff's damage recovery.[206] The *Curry* court found its adoption of the contributory negligence approach to be justified in light of *Spier's* recognition that such an approach was applicable only if the plaintiff's failure to exercise due care had caused the accident.[207] In this regard, Justice Brown deemed it questionable whether there would have been any accident at all had the plaintiff been wearing the available seatbelt.[208] The court also noted that although *Spier's* rejection of the contributory negligence approach was based in part upon the fear that any recovery by a contributorily negligent plaintiff would be barred,[209] the instant case was controlled by the comparative negligence doctrine, which does not pose an absolute bar to the negligent plaintiff's recovery.[210]

It is submitted that the *Curry* court correctly determined that a plaintiff's failure to wear an available seatbelt may be considered by a jury as evidence of contributory negligence when such failure is an alleged cause of the accident. Clearly, the *Curry* approach does not conflict with the *Spier* decision, which expressly left this issue open.[211] It can be argued that *Spier*'s "avoidable consequences" approach is inappropriate when nonuse of a seatbelt

---

[206] *Id.* In *Spier,* the plaintiff was travelling in her automobile at approximately 40 miles per hour on New York Route 31, a highway with a speed limit of 50 miles per hour. *Id.* at 446, 323 N.E.2d at 165, 363 N.Y.S.2d at 917. As the plaintiff neared an intersection, she allegedly reduced her speed to 20 miles per hour and began negotiating a left-hand turn. *Id.* While in the westbound lane of the highway, the plaintiff's car was struck by the defendant's tractor-trailer, which was attempting to pass the plaintiff's vehicle. *Id.* at 447, 323 N.E.2d at 165, 363 N.Y.S.2d at 917-18. As a result of the collision, the plaintiff was thrown from her automobile, which then rolled over her and pinned her legs under a wheel. *Id.*, 323 N.E.2d at 165, 363 N.Y.S.2d at 918. The plaintiff was not wearing the seatbelts with which the vehicle was equipped. *Id.* Clearly, the situation that existed in *Spier* is factually distinguishable from that of *Curry* insofar as, in the former, the plaintiff's nonuse of the available seatbelt was not alleged to be a cause of the accident.

[207] 89 App. Div. 2d at 8, 454 N.Y.S.2d at 315; *see* Spier v. Barker, 35 N.Y.2d 444, 451, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 921 (1974).

[208] 89 App. Div. 2d at 7, 454 N.Y.S.2d at 315.

[209] *Id.* at 8, 454 N.Y.S.2d at 315; *see* Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920-21 (1974).

[210] 89 App. Div. 2d at 8-9, 454 N.Y.S.2d at 315-16; *see infra* note 216.

[211] *See* 35 N.Y.2d 444, 451 n.3, 323 N.E.2d 164, 168 n.3, 363 N.Y.S.2d 916, 921 n.3 (1974); *supra* note 192. It is interesting to note that the *Curry* court characterized its holding as "contrary to the general rule" established in *Spier.* 89 App. Div. 2d at 2, 454 N.Y.S.2d at 312. It is suggested, however, that this language is misleading since the *Spier* Court unequivocally stated that its holding was not necessarily applicable to the situation in which nonuse of a seatbelt is an alleged cause of the accident. *See supra* note 192.

causes the accident. While both approaches are concerned with conduct on the part of the plaintiff that contributes to his own harm,[212] and both deal with the plaintiff's failure to act reasonably,[213] only the contributory negligence approach is applicable to the situation in which a plaintiff acts negligently before any injuries have been sustained.[214] Furthermore, it has been noted that the primary reason for any distinction between the two approaches is the need, in a negligence action, for a defense that will apportion damages and not bar all recovery.[215] In light of the enactment of the comparative negligence statute,[216] however, it appears that "avoidable consequences" is no longer essential to the fulfillment of this need.

Notwithstanding the sound analytical basis for its decision, it

---

[212] *See* W. PROSSER, *supra* note 64, § 65, at 423. Prosser has stated that "[b]oth contributory negligence and avoidable consequences rest upon the same fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests . . . ." *Id.* The Restatement, Second, of Torts refers to the causal connection between the harm suffered by the plaintiff and his contributorily negligent conduct as "conduct . . . which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm." RESTATEMENT (SECOND) OF TORTS § 463 (1965). The Restatement also adopts the doctrine of avoidable consequences through its apportionment of damages section, which states that a "plaintiff may be barred . . . from recovery for so much of the harm as is attributed to his own negligence." *Id.* § 465 comment c.

[213] *See* W. PROSSER, *supra* note 64, § 65, at 423. Prosser has observed that the doctrines of contributory negligence and avoidable consequences "require of [a plaintiff] . . . the standard of the reasonable man under the circumstances." *Id.* (footnote omitted). According to the Restatement, Second, of Torts, the attributes of a "reasonable man" required by society to protect himself and others, include "attention, knowledge, intelligence, and judgement." RESTATEMENT (SECOND) OF TORTS § 283 comment b (1965). For discussions of whether a reasonable man would wear a seatbelt in light of the overwhelming evidence indicating the protection that it affords, see Spier v. Barker, 35 N.Y.2d 444, 452, 323 N.E.2d 164, 168-69, 363 N.Y.S.2d 916, 922 (1974); Bentzler v. Braun, 34 Wis. 2d 362, 386-87, 149 N.W.2d 626, 639-40 (1967); Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172, 184-86 (1970); Snyder, *Seat Belt as a Cause of Injury*, 53 MARQ. L. REV. 211, 211 (1970).

[214] *See* W. PROSSER, *supra* note 64, § 65, at 423. Prosser has observed that

> the distinction between the two [approaches] is that contributory negligence is negligence of the plaintiff before any damage . . . has occurred, which bars all recovery. The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted . . . .

Id. (footnote omitted).

[215] *See id.*

[216] CPLR 1411 (1976). Section 1411 of the CPLR states:

> In any action to recover damages for personal injury, . . . the culpable conduct attributable to the claimant . . . , including contributory negligence . . . *shall not bar recovery*, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant . . . bears to the culpable conduct which caused the damages.

Id. (emphasis added).

is submitted that the *Curry* court strayed from its fundamentally correct premise. After concluding that the contributory negligence approach controls when the plaintiff's nonuse of an available seatbelt causes the accident,[217] the court added that, if the jury determines that the plaintiff was not contributorily negligent in failing to wear a seatbelt, the avoidable consequences approach of *Spier* must then be applied in order to reduce the plaintiff's recovery.[218] As the *Spier* Court itself recognized, however, its decision is not applicable to the situation in which the plaintiff's nonuse of an available seatbelt causes the accident.[219] In such cases, it is submitted, the contributory negligence approach alone is applicable. The troublesome aspect of the *Curry* decision is that although the court rationally concluded that contributory negligence, rather than avoidable consequences, is the correct approach when failure to use a seatbelt causes the accident, its holding seems to permit the jury to consider both.

Craig Noble Touma

Tape recording made by criminal suspect prior to suicide attempt and delivered to attorney is privileged

Private papers obtained by an attorney in the course of the attorney-client relationship[220] will be protected from discovery if

---

[217] 89 App. Div. 2d at 8, 454 N.Y.S.2d at 315.

[218] *Id.* at 9, 454 N.Y.S.2d at 316. The court declared that "[i]n the event the jury determines that plaintiff's failure to wear a seatbelt did not constitute contributory negligence . . . , then under the general rule in *Spier* such conduct may still be considered in mitigation of damages." *Id.*

[219] 35 N.Y.2d at 451 n.3, 323 N.E.2d at 168 n.3, 363 N.Y.S.2d at 921 n.3; *see supra* note 192.

[220] New York has codified the attorney-client privilege at section 4503(a) of the Civil Practice Law and Rules, which provides:

> Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication . . . .

CPLR 4503(a) (1963). At common law, an attorney could not disclose communications made to him in the course of his professional employment without his client's consent. 2 E. CONRAD, MODERN TRIAL EVIDENCE § 1082, at 257 (1956). This rule was intended to promote confidence and the free flow of information between a lawyer and his client so that legal problems would be more thoroughly analyzed and justice more effectively administered. *See id.*; C. MCCORMICK, *supra* note 163, § 87, at 175-76. The privilege afforded by section 4503(a) of the CPLR extends only to revelations made for the purpose of seeking a lawyer's