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Feature Article

Circuit Judge Donald J. O'Brien, Jr. (Ret.)
Circuit Court of Cook County, Illinois
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Seat Belt Evidence Inadmissible? Not So Fast.

In automobile accident cases, issues always arise as to whether the plaintiff was using a seat belt. Because of the Illinois Supreme Court opinion in *Clarkson v. Wright*, 108 Ill. 2d 129 (1985), and section 12-603.1 of the Illinois Vehicle Code, 625 ILCS 5/12-603.1, most practitioners—both plaintiff and defense—believe that seat belt evidence is inadmissible. This belief is untrue, as will be demonstrated herein.

Statutory Provision Against Evidence of Seat Belt Nonuse is Limited to Contributory Negligence and Mitigation of Damages

The Illinois Supreme Court held in Clarkson *v. Wright*, that evidence of failure to wear a seat belt should not be admitted with respect to either the question of liability or damages. The Illinois General Assembly codified the rule in *Clarkson* in the Illinois Vehicle Code, 625 ILCS 5/12-603.1. Subsection (c) of the "seat belt statute" provides as follows:

> **Sec. 12-603.1. Driver and passenger required to use safety belts, exceptions and penalty**
>
> (c) Failure to wear a seat safety belt in violation of this Section shall *not be considered evidence of negligence*, shall not limit the liability of an insurer, and shall *not diminish any recovery for damages* arising out of the ownership, maintenance, or operation of a motor vehicle.

625 ILCS 5/12-603.1(c) (emphasis added).

Indeed, the Illinois appellate court and the Court of Appeals, Seventh Circuit have clarified the scope of the statutory prohibition against evidence of failure to wear a seat belt. In *Bachman v. General Motors Corp*., 332 Ill. App. 3d 760 (4th Dist. 2002), the Illinois Appellate Court, Fourth District, stated that section 12-603.1(c) does not preclude all seat belt evidence, but only evidence of nonuse in determining whether the person was negligent in failing to utilize the vehicle's seat belt system. *Bachman*, 332 Ill. App. 3d at 799. Clearly, the Illinois seat belt statute prohibits a defendant from introducing evidence that a plaintiff was contributorily negligent in failing to wear a seat belt. *DePaepe v. General Motors Corp.*, 33 F. 2d 737, 746 (7th Cir. 1994).

Contributory negligence is conduct by the plaintiff that *brings about the original injury*; whereas, mitigation of damages involves the plaintiff's actions in *minimizing the harm after the original injury*. *See Grothen v. Marshall Field & Co.*, 253 Ill. App. 3d 122, 127-128 (1st Dist. 1993); *Brady v. McNamara*, 311 Ill. App. 3d 542, 547 (1st Dist. 2000).

Indeed, the duty to mitigate only arises *after* the defendant's tortious conduct inflicted an injury on the plaintiff. *Brady*, 311 Ill. App. 3d at 550. In other words, the time sequence is an important factor in distinguishing contributory negligence from mitigation of damages. Mitigation of damages arises only *after* the original injury.

There is no question that the Illinois seat belt statute is directed to the contention that a plaintiff was negligent in failing to utilize a vehicle's restraint system. *DePaepe*, 33 F.3d at 746. Seat belt evidence is admissible so long as the use of such evidence is not for either contributory negligence or mitigation of damages. *See, e.g., Walsh v. Emergency One, Inc*., 26 F.3d 1417, 1420 (7th Cir. 1994) (seat belt evidence going to defect issue not assigned as error as the plaintiff conceded that the manufacturer could present this evidence to try to persuade the jury that because the truck had seat belts in the enclosed area, the truck was not unreasonably dangerous); *Oakes v. General Motors Corp.*, 257 Ill. App. 3d 10, 19 (1st Dist. 1993); *appeal denied*, 155 Ill. 2d 563 (1994) (seat belt evidence admitted in case involving allegedly defective seat back); *Bachman*, 332 Ill. App. 3d at 799 (evidence of seat belt use relevant for the limited purpose of establishing whether plaintiff was involved in a frontal or side impact collision).

Clearly, neither the *Clarkson* case nor the seat belt statute prohibits admission of seat belt evidence on the issue of proximate cause.

Seat Belt Evidence is Relevant and Admissible on the Issue of Proximate Cause

A plaintiff's conduct in failing to use a vehicle's seat belt is relevant and admissible on the issue of proximate cause of the injury. In the Illinois Supreme Court case of *Korando v. Uniroyal Goodrich Tire Co*., 159 Ill. 2d 335 (1994), the plaintiff's decedents were killed in a one-car motor vehicle accident after the tread and top belt of the right rear steel-belted radial tire separated from the bottom belt. *Korando*, 159 Ill. 2d at 338-39. The decedent's automobile skidded and went off the roadway, where it collided with a tree, vaulted into the air, and landed upside-down in a creek. Plaintiff's decedents died as a result of the injuries sustained in the accident. *Id.* at 339.

The tire involved in the accident had three punctures that were repaired with patches and a plug. The beads of the tire had been damaged such that an inner tube was placed in the tire to ensure that the tire retained air. *Id.*

The sole theory of recovery was strict liability in tort. The defendant tire manufacturer denied the plaintiff's allegations and raised affirmative defenses based on misuse, assumption of the risk of injury, and the driver's contributory negligence. *Id.* However, prior to trial, the defendant tire manufacturer *withdrew* its affirmative defenses. As such, the three affirmative defenses were not presented to the jury for consideration. *Id.* However, the tire manufacturer, through expert testimony, presented evidence of the driver's speed, braking, and steering as the *proximate cause* of the accident. *Korando*, 159 Ill. 2d at 344. The *Korando* court held that evidence of plaintiff's conduct is directly relevant to the issue of proximate cause. The *Korando* court concluded:

> We find that the conduct of a plaintiff or a third party is relevant to the issue of proximate cause in a strict products liability case. Although a *plaintiff's negligence is generally not an issue in a strict products liability case*, evidence relating to the *plaintiff conduct* is *admissible* to establish a defendant's theory of defense that the product was not the *proximate cause* of the plaintiff's injuries.

Id. at 345 (emphasis added). The *Korando* court stated that the evidence of the decedent driver's speed, braking, steering, and the substantial alteration to the tire was relevant to the defendant's denial of the plaintiff's claim, and, therefore, properly admitted. *Id*. at 345-46.

A plaintiff's conduct in his failure to wear his vehicle's seat belt system is relevant to demonstrate the natural and ordinary course of events that led to the plaintiff's injuries. *See* IPI 15.01 [proximate cause - definition]. It is *not* necessary that the defendant establish that the plaintiff's conduct amounted to negligent conduct. *McDonnell v. McPartlin,* 192 Ill. 2d 505 (2000).

Because neither *Clarkson* nor the Illinois seat belt statute prohibits the use of evidence of a failure to use a seat belt on the issue of proximate cause, and the evidence is being offered only on the issue of proximate cause, there is no need to plead the failure to use a seat belt as an affirmative defense. The Illinois Supreme Court in *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83 (1995), held that because the plaintiff bears the burden on proximate cause that any evidence that attacks proximate cause or seeks to nullify the defendant being a proximate cause is not an affirmative defense. *See also McDonnell*, *supra*. *Leonardi*, in essence, says it is not the burden of the defendant to plead lack of proximate cause, but it is the plaintiff's burden to prove proximate cause. *Leonardi,* 168 Ill. 2d at 93-94.

The issue then becomes: How do you raise an issue of fact as to the failure to use a seat belt as a proximate cause of plaintiff's injuries? The testimony needed should come from either a physician or a biomechanical engineer; a biomedical engineer is preferable to a physician. As a defense attorney, you have to scrutinize the fact pattern to determine whether to assert the defense. You must keep in mind that in most cases the defense is only viable as to a portion of the injuries. Rarely will you find a fact pattern wherein the expert can opine that all of plaintiff's injuries were caused by a failure to use a seat belt.

The next issue is how you get the seat belt proximate cause defense before the jury. The issue gets before the jury via a jury instruction. Assuming you have raised a triable issue of fact, the giving of an instruction is warranted if it is supported by some evidence in the record, even if the evidence is unsubstantial. *Leonardi*, 168 Ill. 2d at 100-101; *Heastie v. Roberts*, 226 Ill. 2d at 515, 543 (2007).

The appropriate instruction to be proffered is IPI 12.05. It reads:

12.05. Negligence-Intervention of Outside Agency

If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.

[However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.]

IPI 12.05 is appropriate when you are claiming a condition; in this case, lack of seat belt use, other than the conduct of the defendant was the proximate cause of the injury. *Roach v. Springfield Clinic*, 223 Ill. App. 3d 597 (4th Dist. 1991); *Krklus v. Stanley*, 359 Ill. App. 3d 471(1st Dist. 2005). IPI 12.04 is not appropriate because 12.04 applies only where it is contended that the conduct of some person is the sole proximate cause. *See* Notes on Use, IPI 12.04. In other words, it is not proper for the court to give IPI 12.04 when the conduct at issue is the plaintiff's.

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Judge Donald J. O'Brien, Jr., graduated from Northwestern University School of Law, 1963. Judge O'Brien was a principal in the firm of *O'Brien, Redding and Hyde* for 27 years. He has 27 years of experience as a trial lawyer, including arguing and trying cases in both the state and federal courts and the appellate level in both the state and federal courts. Appointed Cook County Circuit Court Judge, 1990; assigned in 1991 to Law Division hearing major personal injury cases and contract disputes. Elected to Cook County Circuit Court for full six-year term in November 1992. As an active trial lawyer, Judge O'Brien tried 107 cases to verdict. As a Presiding Judge, he presided over approximately 320 cases that went to verdict before a jury.

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About the IDC

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