New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

Personal Injury QUARTERLY

An ALM Publication

WWW.NYLJ.COM

MONDAY, MAY 10, 2010

'Click It' or Waive It

A practical guide to using the 'seatbelt' defense.

BY ALAN R. LEVY

FROM THE FIRST DAY of Torts in law school, attorneys are taught the maxim that a plaintiff has a duty to mitigate his or her own damages.

Over a century of New York law holds that a plaintiff "who claims to have suffered personal injuries by reason of defendant's negligence or other tortious conduct is required to use reasonable and proper efforts to make damage as small as practicable, and is not entitled to recover for any damage which by the use of such effort might have been avoided." *Favier by Favier v. Winick*, 151 Misc.2d 910, 583 N.Y.S.2d 907 (N.Y. Sup. Ct. 1992); citing *Lyons v. Erie Railway Co.*, 57 N.Y. 489 (1874); *Blate v. Third Ave. Railroad Co.*, 44 App. Div. 163, 60 N.Y.S. 732 (1st Dept. 1899).

In recent decades, one of the more relevant areas of plaintiff's mitigation is whether or not a person in an automobile accident was wearing a seatbelt. Defendants in most auto cases invariably raise the "seatbelt defense" as an affirmative defense. However, despite over 35 years of case law on the subject, there is still debate and confusion among attorneys as to how this defense is applied and utilized.

The first time the New York courts dealt with the subject was in *Spier v. Baker*, 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974), when the Court of Appeals addressed the controversy as a case of first impression. The Court held that a plaintiff's failure to use a seatbelt was not negligence per se, although the Court dealt with this question while the doctrine of contributory negligence was still in effect.[1]

Spier held that the mere fact that a plaintiff was not wearing his or her seatbelt, did not

© ISTOCK

cause the accident, therefore, the doctrine of contributory negligence did not apply. However, the Court of Appeals did hold that a jury was entitled to determine that a plaintiff who failed to wear a seatbelt was not acting as a "reasonable person."

Further, a defendant should not be required to pay for those damages that were specifically caused by the plaintiff's failure to wear the seatbelt. As a result, the Court determined that a defendant was not allowed to raise the seatbelt defense during the liability portion of trial, but could during the damages phase.

Notably, CPLR 1411 was enacted immediately after the *Spier* decision and in 1984, the Legislature adopted Vehicle and Traffic Law §1229-c, which mandates the use of seatbelts for all motor vehicle drivers and front seat passengers. However, the legislature also added a protection for plaintiffs by codifying the *Spier* rule:

> Non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense.

See Vehicle and Traffic Law §1229-c(8).

There is still an open question whether the seatbelt defense is admissible in a case where it is alleged that the failure to wear a seatbelt was the actual cause of the accident.

In *Curry v. Moser*, 89 A.D.2d 1, 454 N.Y.S.2d 311 (2nd Dept. 1982), the court dealt with an odd factual scenario: a passenger not wearing a seatbelt fell out of the vehicle when the door suddenly opened without any collision. The *Curry* court held that plaintiff's failure to wear her seatbelt should have been presented during the liability portion of the trial. But see *Boyd v. Trent*, 746 N.Y.S.2d 191, 193, 297 A.D.2d 301, 302 (2nd Dept. 2002), where the court held that *Curry* was abrogated by Vehicle and Traffic Law §1229-c).

While there may be scenarios where plaintiff's failure to wear a seatbelt can be the "cause" of an accident, it appears that a defendant has a near insurmountable hurdle to have such evidence admissible during the liability portion of trial. Hence, a defendant who raises the "seatbelt defense" must craft it so that such evidence will be admissible in the damages phase.

How to Know if Seatbelt Was Worn?

A defendant must utilize all available sources of evidence to determine that the plaintiff failed to wear a seat belt in the first place.

Clearly, a savvy plaintiff will testify during deposition or at trial that he was wearing his seatbelt, even when he was not. Hence, a skilled defense counsel must make the most out of what is available. If no evidence exists and a defendant is left with mere speculation that plaintiff was not wearing a seat belt, a competent plaintiff's counsel will succeed on a summary judgment motion to dismiss the affirmative defense. See *Stickney v. Alleca*, 52 A.D.3d 1214, 860 N.Y.S.2d 352 (4th Dept. 2008).

ALAN R. LEVY *is a partner in the New York City office of Buckley & Curtis.*

First, there is the police/accident report and any good defense attorney will seek to obtain this report immediately. In most motor vehicle accidents, the local police or other law enforcement agencies will investigate the accident and prepare a report.

New York, like most other states, has a standard motor vehicle accident report form. In Box #10 of the MV-104AN form, the investigating officer is required to indicate whether the drivers and passengers involved in the incident were wearing their seatbelts.

Often, the investigating officer will leave this section blank, or incorrectly state that the plaintiff was wearing a seatbelt. However, there are other means to determine whether a plaintiff was not wearing a seatbelt.

One can never underestimate the importance of the EMT/EMS report or emergency room records. First response records are crucial in investigating the facts of an incident as the facts are freshly recollected, and are recorded immediately. Also, a plaintiff will be more inclined to be honest to a treating doctor, nurse or ambulance crew who is providing immediate medical care.

Even if the accident reports or emergency room records do not indicate whether the seatbelt was worn, an analysis of plaintiff's injuries can be an excellent indicator.

Obviously, if a plaintiff is ejected from the vehicle or strikes her head on the windshield, these are clear indicators that a seatbelt was not worn. Likewise, in a high impact collision, if the shoulder and lap harness are worn properly, they often leave a mark on the plaintiff, which may be indicated on the medical records.

Finally, even though most plaintiffs are savvy enough to deny failure to wear a seatbelt, that should never be a reason not to ask the question at deposition. A defense attorney may be surprised by a plaintiff who candidly admits to not wearing her seatbelt.

Using the Defense

Establishing that a plaintiff was not wearing a seatbelt does not end the process; rather it is just the beginning.

First of all, the seatbelt defense is an affirmative defense and must be alleged as such. See *Wooten v. State*, 302 A.D.2d 70, 753 N.Y.S.2d 266 (4th Dept. 2002). While CPLR 3025 states that answers, like all pleadings are freely amended, there is no reason why the defense should not be raised in the defendant's initial answer. See, *Newton v. Aqua Flo Co.*, 105 A.D.2d 919, 483 N.Y.S.2d 133 (4th Dept. 1984), where the court granted the defendant leave to amend the answer to allege the seatbelt defense.

Once the defense is alleged, a defendant must take care to ensure that its affirmative defense is not waived. See *Mata v. Gress*, 17 A.D.3d 1058, 794 N.Y.S.2d 239 (4th Dept. 2005), where the appellate court stated that the lower court improperly precluded the seatbelt defense, but the defendant failed to properly raise the issue on appeal.

Assuming defense counsel has properly raised the defense for trial, and has admissible evidence that plaintiff failed to wear a seatbelt, the defense counsel must then properly present this evidence in the damages portion of the trial. Alas, there are few decisions that delve into the questions as to how a defendant properly raises the seatbelt defense during the damages phase.

Going back to the *Spier* decision, the defendant in that case introduced expert testimony, a mechanical and aerospace engineer who determined that had plaintiff been wearing her seatbelt, she would not have been ejected from the vehicle, and would have sustained fewer injuries. Specifically, it would have been impossible for the vehicle to roll over onto her, crushing her legs. The Court held such testimony allowable.

A plaintiff **ejected** from a vehicle or **striking** her head on the windshield are **clear indicators** that a seatbelt was not worn. In a **high impact** collision, properly worn shoulder and lap harnesses often leave a mark that may be indicated on the **medical records**.

In *Dowling v. Dowling*, 138 A.D.2d 345, 525 N.Y.S.2d 636 (2nd Dept. 1988), the court held that the seatbelt defense was properly submitted to the jury since defendant had produced a properly qualified expert who testified as to "a causal connection between the plaintiff's nonuse of an available seatbelt and the injuries and damages sustained," although, the court never defined what a "properly qualified expert" was.

In *Brullo v. Shiro*, 239 A.D.2d 309. 657 N.Y.S.2d 92 (2nd Dept. 1997), the Appellate Division reversed a trial court's decision to preclude an accident reconstruction expert who opined that plaintiff would have not suffered any facial injuries had he been wearing his seatbelt.

One of the leading decisions dealing with the defense is *Karczmit v. State*, 155 Misc.2d 486, 588 N.Y.S.2d 963 (N.Y. Ct. of Claims 1992). In *Karczmit*, the court gave an exhaustive review of the history of the seatbelt defense, addressing both the case law and legislative history at the time. Further, it is cited by most litigation guides and horn books on the subject.

First of all, *Karczmit* was a wrongful death claim. Hence the court identified that the seatbelt defense was rather problematic for such claims since a defendant would likely present evidence that had plaintiff worn a seatbelt, death would not have occurred, although some form of injury might have. If a defendant were successful in proving that death would not have occurred but for plaintiff's failure to wear a seatbelt, plaintiff's cause of action would be barred. Id. at 492 (although the court conceded that this would be a "heavy burden" on defendant.)

However, despite the fact *Karczmit* provides an extensive analysis of the seatbelt defense, it suffers from the same limitation as other published decisions in that it gives little guidance as to how a defendant can properly utilize it. However, the court does stress that the defense was well served by its choice of expert, Dr. James Pugh, who gave testimony that the collision that caused plaintiff to be ejected from the vehicle occurred at an impact speed of 15-17 MPH. Further, had plaintiff been wearing her seatbelt, she would never been ejected, and would have most likely lived.

Conclusion

While the decisions of these courts fail to give much in the way of specific guidance as to the application of the seatbelt defense, there are definite themes that can be taken away and utilized.

It would appear that the crux of a good defense is the use of an expert who has experience with accident reconstruction and/or the engineering of an automobile accident with and without the use of a seatbelt.

Furthermore, the expert must offer his opinion by comparing how the plaintiff would have been injured with and without the use of seatbelts. A favorable defense expert opinion will argue that plaintiff's injuries would have been relatively minor had he or she been wearing a seatbelt. Such an expert opinion will most likely be both admissible and persuasive to a jury.

1. Of course, in the bygone era of contributory negligence, even a finding as little as 1 percent negligence on a plaintiff would bar that plaintiff from any recovery, no matter how devastating the damages were. *Kelly v. Long Island Lighting Co.*, 31 N.Y.2d 25, 334 N.Y.S.2d 851 (1972); *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973). The harsh rule of contributory negligence was replaced in 1975 with a pure comparative negligence system, by which the percentage of plaintiff's negligence would be apportioned by a jury and any damages would be reduced by that percentage. See CPLR 1411.