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May 11 **2012**

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Damages Pt. 5 – Assessing Damages When Injured Person is Partially at Fault

In the fifth installment in our ongoing series of posts discussing damages the attorneys here at Pavlack Law discuss the two competing concepts of contributory negligence and comparative fault. While the concept of contributory negligence is fundamentally an issue of liability and not of damages, a discussion on comparative fault necessitates an understanding of contributory negligence.

Under common law – judicially created law – if a person was at all negligent or at fault for his or her injuries then that person was not permitted to recover anything from a negligent person who caused the harm. This meant that if a court or jury found that a plaintiff was even 1% responsible for his or her own injuries then the plaintiff was completely barred from recovering anything from the defendant, even where the defendant was 99% responsible for plaintiff's injuries. This concept is known as the doctrine of contributory negligence, meaning that the plaintiff's own negligent conduct contributed to his or her own injuries. Courts have described application of the doctrine thusly:

> A plaintiff is contributorily negligent when the plaintiff's conduct "falls below the standard to which he should conform for his own protection

> and safety. Lack of reasonable care that an ordinary person would exercise in like or similar circumstances is the factor upon which the presence or absence of negligence depends." . . . Expressed another way, "[c]ontributory negligence is the failure of a person to exercise for his own safety that degree of care and caution which an ordinary, reasonable, and prudent person in a similar situation would exercise."

Although the doctrine was unquestionably harsh it did have two rational limitations to application. The first is that it only applied to torts arising out of the negligent acts of a defendant. This means that where a person commits an intentional tort – such as fraud, battery, defamation, intentional infliction of emotional distress, theft, conversion, et cetera – that person cannot assert the contributory negligence doctrine. The second is that the doctrine acts as an affirmative defense. This means that the onus is on the defendant to plead the defense and to carry the burden of proving that the plaintiff was actually negligent.

Slowly, but surely, the harshness and unjust results occasioned by the doctrine of contributory negligence spurred the passage of legislation in the many states to replace the doctrine with a more rational and reasonable approach. In Indiana this legislation took the form of the Comparative Fault Act which came into effect on January 1, 1985. In comparative fault the law aligned with commonsense. Comparative fault acts to reduce a plaintiff's recovery of damages by a ratio equivalent to his or her apportioned amount of negligence in causing the injury instead of barring recovery altogether. What this means is that where the plaintiff was 1% at fault and the defendant 99%, the plaintiff would be able to recover 99% of his or her damages. Compare this result with application of the doctrine of contributory negligence in which the same plaintiff would not be able to recover any amount of his or her damages.

While comparative fault now permits a plaintiff who was partially at fault to recover against a defendant, the plaintiff can only recover if he or she was not more than 50% at fault. Another point to be made is that to recover against a defendant, an individual defendant does not need to be even 50% responsible. Where there are multiple defendants, so long as the total percentage of fault assigned to the defendants as a whole is at least 50%, the plaintiff can recover against each defendant in a proportion reflecting that defendant's apportioned fault.

To further illustrate how comparative fault operates let us return to the case *Key v. Hamilton* from a previous post. Recall that in that case a truck driver negligently waived a car into an intersection causing that car to pull in front of a motorcycle resulting in a collision seriously injuring the motorcyclist. In that case the jury found that the driver of the car was 50% at fault, the driver of the truck

45% at fault, and the motorcyclist 5% at fault. Under contributory negligence the fact that the motorcyclist was 5% at fault would have completely barred his recovery. However, under comparative fault the motorcyclist was able to recover 50% of his damages from the driver of the car and 45% from the truck driver. Note that the truck driver was not even 50% at fault for the accident and yet he was still responsible to pay damages to the motorcyclist. The reason that truck driver was required to pay damages is because combined the two defendants – the truck and car drivers – were a combined 95% at fault.

If we completely remove the car driver from the occasion and allot his fault to the motorcyclist – meaning that the truck driver is still 45% at fault and the motorcyclist now 55% at fault – the motorcyclist would not be able to recover any of his damages. This is because the motorcyclist, in this scenario, is more than 50% responsible for his own injuries. Indeed, in this modified fact pattern the truck driver would be able to recover against the motorcyclist for any injuries that he received.

Now let us modify the facts of *Key v. Hamilton* once more to further illustrate the Comparative Fault Act. Let us assume that the facts are exactly the same as the original case – 45% to the truck driver, 50% to the car driver, and 5% to the motorcyclist – except in this scenario the lawyer for the motorcyclist dropped the ball and for some reason did not name the driver of the car as a defendant. This means that the only two parties to the case are the motorcyclist and the truck driver. In this scenario the combined total of fault for the defendants in the case is only 45% because the truck driver is the only defendant. However, this does not mean that plaintiff will not be able to recover any damages. Remember, the Comparative Fault Act only requires that plaintiff be not more than 50% at fault. It is silent as to the percentage of fault for defendants. This is because the Act contemplates a jury finding a nonparty partially at fault. So, under this scenario the motorcyclist can still recover the exact same amount from the truck driver as he did in the actual case. However, the difference is that since the driver of the car was not a party to the case, the motorcyclist cannot recover any money for the 50% that would have been charged to the driver of the car.

While the Comparative Fault Act largely abrogated the common law doctrine of contributory negligence, it did not completely eradicate the rigid doctrine. The Comparative Fault Act specifically excludes its application to certain areas of law. One specific, and very common, area in which the contributory negligence doctrine still applies is in claims against a governmental entity. While this exception may seem trivial, think for a moment how many entities fall into that category of governmental entities. For example, many of the hospitals in Indiana derive funding from the state and are still governed by contributory

negligence. What this means, in continuing the example, is that where a visitor to the hospital is injured, that visitor's claim will still be barred if he or she is even one iota at fault.

These exceptions to the Act are not the only way in which the doctrine of contributory negligence has survived. Like contributory negligence, comparative fault still requires the defendant to prove to what extent, if at all, plaintiff was at fault. Moreover, where the defendant has committed a criminal offense against the plaintiff and has subsequently been proven guilty in a criminal trial, the plaintiff can recover 100% of his or her damages from the defendant regardless of what percentage of a fault a jury may assign to the plaintiff. This means that the classic line from criminals that "the victim had it coming" has no value in a court of law.

One major difference between contributory negligence and comparative fault that is very often overlooked – even by practicing attorneys – is that where contributory negligence did not apply to intentional torts it does apply, in a way, under comparative fault. "In the case of intentional torts, the Act does not affect a defendant's liability but operates to decrease the amount of damages a plaintiff recovers if he has not appropriately mitigated his damages." What this means is that where a plaintiff may have been 60% at fault for suffering from the intentionally tortious acts of a defendant, the plaintiff will still be able to recover from the defendant – even though the plaintiff's allocation of fault is above 50%. However, while plaintiff can recover, the plaintiff's recovery will be diminished by his or her allocation of fault. This arises from the concept of the duty to mitigate damages – discussed in part 2 of our series on damages.

As always, when it comes to a complex area of law it is always wise to find a lawyer who knows Indiana law, has experience protecting the rights of injured persons, and can zealously advocate for you. Join us again for our next post in the series on damages, and remember, Safety first, Pavlack Law second.

- Pt. 1 – Introduction to Damages and Loss of Consortium
- Pt. 2 – Duty to Mitigate Damages
- Pt. 3 – Diminished Value of Vehicle Due to Traffic Accident
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- Pt. 9 – Damages for the Loss of Chance of Survival from Medical Malpractice
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Sources

- Comparative Fault Act, codified at Ind. Code Section 34-51-2-1, *et. seq*.
- *Key v. Hamilton*, 963 N.E.2d 573 (Ind. Ct. App. 2012), *trans. denied*.
- *Funston v. School Town of Munster*, 849 N.E.2d 595 (Ind. 2006).
- *Coffman v. Rohrman*, 811 N.E.2d 868 (Ind. Ct. App. 2004).
- *Wallace v. Rosen*, 765 N.E.2d 192, 199 (Ind. Ct. App. 2002).
- Restatement of the Law, Third, Torts: Apportionment of Liability § 4 Proof of Plaintiff's Negligence and Legal Causation. "The defendant has the burden to prove plaintiff's negligence, and may use any of the methods a plaintiff may use to prove defendant's negligence. Except as otherwise provided in Topic 5, the defendant also has the burden to prove that the plaintiff's negligence, if any, was a legal cause of the plaintiff's damages."