By Neal Eggeson

# Mitigation of damages – rewritten into irrelevance

*Editor's Note: The views expressed in this article are not necessarily those of the Indiana State Bar Association. The Editor will consider publication of opposing viewpoints under proper submission to* Res Gestae.

Fresh on the heels of last month's article ("What Went Wrong with 'Mitigation of Damages'?: A Proposal for Two-Tiered Fault Allocation," *Res Gestae*, April 2005, at p. 26), the Indiana Supreme Court handed down its long-awaited decision in *Kocher v. Getz*. The Court's decision will make life easier for plaintiffs across the state, but defense attorneys will be left with a sour taste in their mouths.

*Kocher v. Getz* was to resolve whether the defense of "mitigation of damages" qualifies as "fault" under the Comparative Fault Act. Though the Act explicitly includes "mitigation of damages" in its definition of "fault,"[1] many attorneys and judges have found it difficult to reconcile that language with common sense. After all, how can a plaintiff's actions *after* a collision, slip-and-fall or similar personal injury have any bearing whatsoever on a defendant's liability for the original accident?

Because of this apparent disconnect between the language of the Act and our own intuition, the Supreme Court had three options in *Kocher v. Getz*: 1) continue to apply the Comparative Fault Act as written and ignore our intuition; 2) reexamine the Act in an effort to reconcile its definition of "fault" with our intuition; or 3) ignore the language of the Act and rewrite the statute to comport with our intuition. In last month's article, this author proposed that the Supreme Court adopt the second approach. Unfortunately, the Court chose the third option.

## *Kocher v. Getz:* the background

As is often the case in lawsuits involving "mitigation of damages," *Kocher v. Getz* arises from a motor vehicle collision. In March 1996, the respective vehicles of Kocher and Getz collided at an intersection in Huntington County. The day after the collision, Getz went to her general practitioner with complaints of neck pain. Over the next several months, Getz received treatment from an orthopedic surgeon, a neurosurgeon and a chiropractor, incurring approximately $10,000 in medical expenses. Additionally, Getz testified that she lost approximately $25,000 in wages – over half of which came from a part-time job that she started after the accident but quit before trial.

Kocher conceded that he caused the collision; his defense focused on Getz's alleged injuries and damages. As part of his defense, Kocher argued that Getz failed to mitigate her damages because she admitted that she had started her part-time job after the accident and had made no effort to replace the alleged lost income after quitting.

Though the trial court instructed the jury on "mitigation of damages," the court refused to give any comparative fault instructions on fault allocation. With no opportunity for fault apportionment on the verdict form, the jury returned a verdict of $250,000 against Kocher.

On appeal, Judges Najam and Darden concluded that the trial court erred by refusing Kocher's tendered instructions on fault allocation. The majority reasoned that "where a defendant admits liability but raises a mitigation of damages defense, it may be reasonable under certain circumstances for the jury to find that the plaintiff's failure to avoid the consequences was so substantial that the damages could be reduced to nothing."[2] Judge Vaidik dissented, arguing that the General Assembly intended to differentiate between mitigation of damages *before* an accident or initial injury and mitigation of

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damages *after* the accident or initial injury.[3]

## *Kocher v. Getz:* the Supreme Court's reasoning

On March 30, 2005, the Supreme Court unanimously upheld the trial court and rejected the majority opinion of the Court of Appeals. The Supreme Court's analysis consists of the following:

> As pointed out in *Deible* [*v. Poole*], the obligation of a plaintiff to mitigate damages customarily refers to the expectation that a person injured should act to minimize damages after an injury-producing incident. This concept is different from our statutory process of assessing percentage of fault which considers "the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property." *Deible* explains that "[f]ailure to minimize damages does not bar the remedy, but goes only to the amount of damages recoverable." We observe that in the six years that have elapsed since *Deible*, the legislature has not modified its definition of "fault."[4]

Obviously, the Court's view that mitigation of damages "is different from our statutory process of assessing percentage of fault" seems difficult to reconcile with the explicit language of the Act. But to remedy the apparent inconsistency, the Court self-references its own adoption of the *Deible*[5] opinion and concludes that since the General Assembly has done nothing to respond to *Deible*, the reasoning therein must be sound. This reflects a questionable addendum to our rules of statutory construction: If the legislature is explicit that "[f]ault ... includes ... unreasonable failure to ... mitigate damages," and if the Court improperly ignored that language, is it incumbent upon the General Assembly to pass an amendment to the Comparative Fault Act? One wonders how such an amendment would read beyond "we really meant it the first time!"

And, unfortunately, the reasoning used by the Court of Appeals and adopted by the Supreme Court in *Deible* fails to salvage the Court's position. In *Deible*, the Court of Appeals relied on the following Am.Jur. summary to conclude that a jury should only consider the "failure to mitigate" defense when awarding damages – *not* when apportioning fault:[6]

> Failure to minimize damages does not bar the remedy, but goes only to the amount of damages recoverable. Otherwise stated, if the act of the injured party does not operate in causing the injury from which all damages ensued, but merely adds to the resulting damages, its only effect is to prevent the recovery of those damages which reasonable care would have prevented.
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> 22 Am.Jur.2d Damages §497 (1988) (footnotes omitted)[7]

While the Am.Jur. definition is accurate, one must take care to avoid jumping to unjustified conclusions. Likewise, when the *Deible* court holds that "[m]itigation of damages is not a defense to the ultimate issue of liability,"[8] or when the Supreme Court declares that "[f]ailure to minimize damages does not bar the remedy, but goes only to the amount of damages recoverable,"[9] those statements are both absolutely correct and totally irrelevant. The *Deible* opinion, Judge Vaidik's dissent in *Kocher v. Getz*, and the Supreme Court's latest pronouncement each make the same error: Just because "failure to mitigate" is viewed traditionally as a post-tort concept does not mean that it cannot be applied on a percentage basis during fault allocation. As explained in last month's article, the problem is not with the General Assembly's understanding of "failure to mitigate damages"; rather, *the problem is with the Court's insistence that "fault allocation" is synonymous with "liability allocation."*

The Act's fault allocation provision does not tell us to apportion causation of the accident; it tells us to apportion causation of the plaintiff's alleged injury.[10] "A party's culpability is different from the magnitude of damages the party caused."[11] While causation of the

accident certainly bears on causation of a plaintiff's alleged injury, the concepts are not identical. A plaintiff can be just as much at "fault" for her injury (*e.g.*, by failing to follow doctor's instructions) and her damages (*e.g.*, attending unhelpful chiropractic sessions or missing work solely to increase her expenses) *after* an accident as a defendant may be *during* the accident. If a jury is capable of assigning percentages of fault for causation of an accident, there is absolutely no reason why that same jury cannot reduce a plaintiff's damages on a percentage basis after concluding that – as a whole – the plaintiff failed to minimize her injury and keep her damages as low as possible. By including failure to mitigate damages in its definition of "fault," the Act mandates exactly that result.

The standard response, of course, is that a jury *does* reduce its damage reward if it finds that certain damages "could have [been] avoided through the use of reasonable care."[12] But this is both an empty concession and a misstatement of the "failure to mitigate" doctrine. The plaintiff must prove that each medical bill, each lost wage statement, and each element of claimed damages is proximately caused by the defendant's negligence. *That is the plaintiff's burden of proof* – not an affirmative defense. If a given medical expense or wage statement could have been avoided with reasonable care, then that medical expense or wage statement was not proximately caused by the defendant's negligence. Under *Kocher*, "failure to mitigate damages" becomes nothing more than a reminder of the plaintiff's burden to prove her damages, thus stripping it of any and all independent meaning.

Granted, many may applaud how *Kocher* ameliorates a harsh statute. If the Act is applied as written, then a plaintiff who bears no liability at all for a collision may still go home with nothing if the jury decides that – as a whole – more than half of her claimed damages were "trumped up" or unnecessary. (Tellingly, Judge Vaidik emphasizes precisely this scenario in her *Kocher v. Getz* dissent.)[13] Yet this seems more of a disagreement with the 50 percent comparative fault bar than with the "failure to mitigate" doctrine.

Though one may abhor the harsh result, and though one may disagree with the inclusion of post-tort concepts in fault allocation, the fact remains that the General Assembly has spoken and its language is unequivocal. *See Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996) ("statute not unconstitutional simply because the court might consider it born of unwise, undesirable, or ineffectual policies"). The balance between a plaintiff's entitlement to recovery for her injuries and a defendant's right not to be fleeced by an opportunistic plaintiff is one for the General Assembly – not the Court. *Kocher v. Getz* reflects the opposite principle and, in the process, rewrites the longstanding doctrine of "failure to mitigate damages" into functional irrelevance.

1. Ind. Code §34-6-2-45(b) provides:

   "Fault" ... includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.
2. *Kocher v. Getz*, 787 N.E.2d 418, 426 (Ind. Ct. App. 2003).
3. *Kocher*, 787 N.E.2d at 429 (Vaidik, J., dissenting).
4. *Kocher v. Getz*, Slip. Op. 35S02-0312-CV-602, March 30, 2005 (Ind. 2005) (footnotes omitted).
5. 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted on transfer*, 702 N.E.2d 1076 (Ind. 1998).
6. *Id.* at 1316.
7. *Id.*
8. *Id.*
9. *Kocher, supra* note 4.
10. Ind. Code §34-51-2-7(b)(1) provides, in pertinent part: "The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. ... In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property. ..."
11. Restatement (Third) of Torts, Topic 5, sec. 26, at 325 (2001).
12. *Kocher, supra* note 4 (quoting Indiana Pattern Jury Instruction No. 11.120 (2003)).
13. *Kocher*, 787 N.E.2d at 430 (Vaidik, J., dissenting).

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