By Neal F. Eggeson

What went wrong with 'mitigation of damages'? A proposal for two-tiered fault allocation

At first glance, the idea of allocating fault for a plaintiff's injury seems simple enough: Assign a percentage of fault to the plaintiff, to each defendant, and to any nonparties, and make sure the aggregate totals 100 percent. Then each defendant is responsible for his or her assigned percentage of the plaintiff's total damages. Easy, right?

Not really. In 2003, the Court of Appeals in *Kocher v. Getz*[1] tackled a problem that has plagued plaintiffs' lawyers, defense attorneys, judges and civil juries since the very inception of the Comparative Fault Act: How does the defense of "failure to mitigate damages" fit into the concept of fault allocation? 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? And even worse, how can a plaintiff lose her entire recovery if everyone agrees that the defendant was solely responsible for the initial accident, but the jury feels that the plaintiff failed to mitigate her damages by 51 percent or more?

Building the conceptual bridge between "failure to mitigate damages" and principles of fault allocation requires two steps. First, one must identify the mistakes and misconceptions about fault allocation that have found their way into everyday tort analysis. Second, once those misconceptions are corrected, one must come up with a way to make fault apportionment for "failure to mitigate damages" both workable and conceptually sound.

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The first step: where we went wrong

1. Wait, what are we apportioning again?

Driver A is stopped in an intersection, waiting to turn left across oncoming traffic. Driver B approaches the intersection from the opposite direction at a speed above the posted speed limit. Driver A believes the way is clear and begins her turn. Driver B hits his brakes but cannot bring his vehicle to a stop before colliding with the side of Driver A's car, which has just turned in front of him.

Assume that Driver B incurs $5,000 in medical and chiropractic expense following the collision, and he sues Driver A for his personal injuries. How does the judge instruct the jury on fault apportionment in this case? Ind. Code §34-51-2-7(b) tells us:

> The court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:
>
> (1) 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, tangible or intangible, regardless of whether the person was or could have been named as a party. The percentage of fault of parties to the action may total less than 100 percent if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.
>
> (2) If the percentage of fault of the claimant is greater than 50 percent of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required.
>
> (3) If the percentage of fault of the claimant is not greater than 50 percent of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.
>
> (4) The jury next shall multiply the percentage of fault of the defendant by the amount of damages determined under subdivision (3) and shall then enter a verdict for the claimant in the amount of the product of that multiplication.

Here is where the confusion occurs. Most judges (and attorneys) read this statute to mean that the jury is supposed to assign percentages of fault to the plaintiff and defendant with the total fault for the collision totaling 100 percent. Then, assuming the plaintiff's own fault is 50 percent or less, whatever percentage of fault for the collision that is assigned to the defendant is multiplied by the plaintiff's total damages, and that product is reduced to a verdict against the defendant.

What's wrong with that reading of the statute? ***The statute does not tell us to apportion causation of the accident; the statute tells us to apportion causation of the plaintiff's alleged injury.***

"A party's culpability is different from the magnitude of damages the party caused."[2] Certainly, causation of the accident bears on causation of the plaintiff's alleged injury, but the concepts are not identical. Consider a variation on the above example: Assume that Driver B was driving below the posted speed limit and he properly slowed his vehicle as he approached the intersection. If all of Driver B's acts of negligence are removed from the example, then obviously Driver A bears 100 percent of the

fault *for the collision.* But if Driver B refused to attend physical therapy, refused to take his medications, and refused to follow his doctor's orders following the collision such that he exacerbates or extends the duration of his injury, one is hard pressed to conclude that Driver A bears 100 percent of the fault *for the plaintiff's injury.*

The confusion stems from the difficulty in separating "fault for an injury" and "liability for an accident" in our minds. As the majority in *Kocher v. Getz* acknowledged, "[P]erhaps our concern stems from the tendency in the law to use the terms 'fault' and 'liability' interchangeably. ... '[F]ault' encompasses more than one party admitting that he or she caused an accident."[3] As Ind. Code §34-6-2-45(b) tells us:

> "Fault," for purposes of [comparative 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.

The Court of Appeals' decision in *Deible v. Poole*[4] provides an unfortunate example of what can happen when judges try to force a square peg into a round hole, *i.e.,* attempt to reconcile "failure to mitigate damages" and fault allocation without first distinguishing "fault" from "liability." In *Deible*, though the defendant admitted 100 percent liability for a motor vehicle collision, the jury apportioned 100 percent fault to the plaintiff based upon the plaintiff's "failure to mitigate damages." The Court of Appeals reversed, ruling that a jury should only consider the "failure to mitigate" defense when awarding damages – ***not*** when apportioning fault.[5] In other words, the *Deible* court essentially rewrote the statute, removing "failure to mitigate" from the definition of "fault" and relegating the entire concept to nothing more than an *ad hoc* reminder of the plaintiff's burden to prove her damages. *See also Medlock v. Blackwell*, 724 N.E.2d 1135, 1138 (Ind. Ct. App. 2000) (distinguishing *Deible* but agreeing with its reasoning and urging "we believe the better policy would be to treat mitigation of damages as a damage issue rather than a fault allocation issue. ..."). Indeed, the confusion has grown so deeply ingrained that defense attorneys are sanctioned for daring to suggest that 100 percent liability for an accident does not mandate writing a check for 100 percent of a plaintiff's trumped-up damages. *See Childress v. Buckler*, 779 N.E.2d 546 (Ind. Ct. App. 2002).

2. Will we know 'failure to mitigate' when we see it?

Distinguishing "fault" from "liability" ameliorates some of the confusion that arises in wrestling with the concept of "mitigation of damages." When we fail to distinguish the two, it becomes difficult to comprehend how mitigation of damages can bear on causation of an accident. Seemingly by definition, mitigation of damages is something that comes into play *after* an injury has occurred – not when determining who is responsible for that injury in the first place.

Not true, says Judge Vaidik in her fascinating *Kocher v. Getz* dissent. Judge Vaidik adopts a novel strategy for reconciling *Deible* with the Comparative Fault Act's definition of "fault." Rather than concede that *Deible* rewrote the Comparative Fault Act, Judge Vaidik suggests that the General Assembly intended to differentiate between mitigation of damages *before* an accident or initial injury and mitigation of damages *after* the accident or initial injury.[6]

Though the Restatement (Second) of Torts speaks of "mitigation of damages" only in terms of post-accident negligence by a plaintiff, the Restatement (Third) of Torts lends support to Judge Vaidik's approach. According to the Restatement (Third), pre-accident negligence by a plaintiff that aggravates his injuries (*e.g.,* failure to wear a seatbelt or helmet) implicates the doctrine of "avoidable consequences" while post-accident negligence by a plaintiff (*e.g.,* failure to follow a doctor's instructions) implicates "mitigation of damages."[7] Though the Restatement insists that the concepts are distinct, the authors to the Comment acknowledge that "[c]ourts have not always used consistent nomenclature."[8] Indeed, the Indiana Supreme Court decreed that "the avoidable consequences defense looks to [a plaintiff's] post-tort conduct. The rule of avoidable consequences comes into play after a legal wrong has occurred, but where some damages may still be averted, only bars recovery for such damages."[9] Even the majority opinion in *Kocher* insists that "the doctrine of avoidable consequences comes into play *after* a legal wrong has occurred."[10]

So the problem presents itself. No one disputes that a plaintiff's pre-tort negligence may proportionately reduce his or her recovery – regardless of whether we call it "failure to mitigate" or "avoidable consequences." But if "failure to mitigate" *can* be a pre-tort concept, then isn't it possible that Judge Vaidik is correct that the General Assembly intended it only as a pre-tort concept? If so, then *Deible v. Poole* was rightly decided (and, concomitantly, *Kocher v. Getz* was

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wrongly decided), and there is no reason to tinker with our current system for allocating fault. That is, things a plaintiff does after an accident that may prolong or exacerbate his injury implicate proximate causation, medical necessity of treatment, etc. – but *not* fault allocation.

To suggest that the General Assembly intended to limit "failure to mitigate" in the manner suggested by Judge Vaidik is dubious. First, the evidence cited in support of this alleged legislative intent is strained at best: To conclude that the phrase "unreasonable failure to avoid an injury or to mitigate damages" was intended to create a temporal limitation on "mitigate damages" by equating it with "avoid an injury" is to assign profound legislative intent to the clause structure of a single sentence. Similarly, such a reading of the statute is grammatically questionable.[11] Moreover, neither the Restatement (Second) of Torts nor the official comments to the Uniform Comparative Fault Act assigns a pre-tort temporal limitation to "mitigation of damages."[12] Why would the General Assembly intend to relegate "failure to mitigate" to an exclusively pre-tort role if neither of the sources for our Comparative Fault Act recognize such a restriction?

But perhaps the most significant objection to the notion of limiting "failure to mitigate" to pre-tort negligence is that it calls for a wholesale rewriting of longstanding tort doctrine. If fault allocation for "failure to mitigate" applies only pre-injury (*e.g.*, "a plaintiff's failure to attempt to slow down her car to avert an accident after observing a defendant run a stop sign"),[13] then "failure to mitigate" as a post-tort concept loses any and all independent meaning. Without the strength of fault allocation behind it, it is difficult to see how post-tort "failure to mitigate damages" could be anything more than a reminder of the plaintiff's burden to prove proximate causation and medical necessity. If a plaintiff's own failure to follow a doctor's instructions prolonged her recovery or caused additional complications, then the plaintiff failed to prove that those particular expenses or damages were proximately caused by the accident in question; likewise, if a plaintiff's decision to over-treat with questionable homeopathic techniques improperly inflated her medical expenses, then the plaintiff failed to prove that those medical expenses were reasonable or medically necessary. Without fault allocation, there is nothing left to be covered or gained by a "failure to mitigate" instruction.

One can readily imagine a scenario in which a jury believes it is more likely than not that a plaintiff's chiropractic expenses were "caused" by a motor vehicle collision or that years of massage therapy were "reasonable" because of a general practitioner's recommendation, but the jury still feels it is more likely than not that, as a whole, the plaintiff could have done more to keep her medical expenses and damages down. That is where "failure to mitigate damages" comes into play as something beyond the plaintiff's burden of proof; it is

> a reduction of [the] amount [of a plaintiff's damages] not by proof of facts which are a bar to a part of the plaintiff's cause of action, or a justification, nor of facts which constitute a cause of action in favor of the defendant; but rather of facts which show that the plaintiff's conceded cause of action does not entitle him to so large amount as the showing on his side would otherwise justify the jury in allowing him. Mitigation is addressed to the equity of the law.[14]

It seems dubious that the General Assembly would specifically incorporate the recognized and legally significant phrase "mitigate damages" into its definition of "fault" if it intended to eviscerate the existing concept and subsume it within the plaintiff's burden of proof.

The second step: We know what's wrong, so how do we fix it?

So from the preceding section, we know that fault allocation must take into account the difference between "liability for an accident" and "fault for an injury." Similarly, we know that a plaintiff's negligent actions after an accident which prolong or exacerbate her injuries (*e.g.*, refusing to follow a doctor's instructions) must be part of the fault allocation process. Now, how do we mold these concepts into a workable system of fault allocation?

Return to the example of Driver A turning left in front of oncoming (and speeding) Driver B. Let's suppose that Driver B injures his lower back during the collision and launches into a two-year course of chiropractic care to the tune of $10,000. Let's further suppose that plaintiff's counsel successfully convinces the jury that it is "more likely than not" that the two-year course of chiropractic care was reasonable, necessary and proximately caused by the motor vehicle collision, but defense counsel successfully convinces the jury that it is "more likely than not" that the plaintiff could have done more to help himself and reduce the duration of the chiropractic treatment. As such, the jury believes that the plaintiff could have reduced his damages by 30 percent but failed to do so. What does the jury do with all of that information?

The most reasonable solution reconciles *Deible, Kocher* and the explicit language of our Comparative Fault Act: two-tiered

fault allocation. Specifically, a jury should conduct separate fault allocations for liability and for damages. Consider:

The jury concludes that Driver A (defendant) is 75 percent liable for the collision and Driver B (plaintiff) is 2 percent liable for the collision. Under *Deible*, the jury would have no choice but to return a verdict of $7,500 against the defendant even though defense counsel proved that plaintiff failed to mitigate his damages. Under *Kocher*, the jury would be instructed to add plaintiff's liability for the collision (25 percent) to the plaintiff's fault for failing to mitigate his damages (30 percent); at 55 percent fault, the plaintiff goes home with nothing.

But if fault allocation for liability and for damages is calculated separately, we obviate each of the unjust results.

Liability	Damages
P = 25%	P = 30%
D = 75%	D = 70%

Defendant's overall liability for the entire incident (75 percent) x defendant's percentage of responsibility for the plaintiff's damages (70 percent) x plaintiff's total reasonable, necessary, proximately caused damages ($10,000) = a $5,250 verdict for plaintiff and against defendant.

This result conforms with the language of the Comparative Fault Act, *i.e.*, the percentages of fault for causation of the collision total 100 percent, and the percentages of fault for causation of the plaintiff's damages total 100 percent. Moreover, this approach does away with the illogical practice of adding percentages from disparate categories. (If someone is 80 percent liable for a collision and 90 percent liable for the resulting damages, is that person 170 percent responsible?) And though some may argue that adding an additional step to an already complicated process may make the jury's job more difficult, multi-tiered fault allocation is not unheard of. For example, the Restatement (Third) of Torts advocates multiple fault allocations "where damages can be divided by causation."[15]

But perhaps most important, multi-tiered fault allocation remedies the concern that "[i]f the plaintiff has $100,000 in damages but the defendant proves that 51 percent of those damages resulted from the plaintiff not returning to work after the accident, then ... the plaintiff would be entitled to zero damages."[16] If one reads Ind. Code §34-51-2-7(b) carefully, the General Assembly treats causation of the plaintiff's injury as separate from causation of "the total fault involved in the incident." Note that in subsection (b)(1), the General Assembly references "the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property. ..." But in subsection (b)(2), the General Assembly indicates that the 50 percent threshold for modified comparative fault only applies where allocating "the total fault involved ***in the incident*** which caused the claimant's death, injury, or property damage. ..." By including the qualifying phrase "in the incident," the General Assembly explicitly distinguished fault for causation of the injury from fault for causation of the underlying incident; the statute supports the multi-tiered approach. And since the 50 percent bar only applies where the plaintiff's fault ***for the incident*** is greater than 50 percent, mitigation of damages no longer implicates the 50 percent bar.

Indiana may not have to wait long for guidance on the "failure to mitigate damages" issue. The Supreme Court has granted transfer in *Kocher v. Getz.*[17] Hopefully, the Court will take this opportunity to implement two-tiered fault allocation and resolve the confusion over "failure to mitigate damages" once and for all. ⚖

1. 787 N.E.2d 418 (Ind. Ct. App. 2003).
2. Restatement (Third) of Torts, Topic 5, sec. 26, at 325 (2001).
3. *Kocher*, 787 N.E.2d at 41-42.
4. 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted on transfer*, 702 N.E.2d 1076 (Ind. 1998).
5. *Id.* at 1316.
6. *Kocher*, 787 N.E.2d at 429 (Vaidik, J., dissenting).
7. Restatement (Third) of Torts, Topic 1, sec. 3, cmt. b, at 39 (2001).
8. *Id.* at 39.
9. *State v. Ingram*, 427 N.E.2d 444, 447 (Ind. 1981).
10. *Kocher*, 787 N.E.2d at 425 (emphasis in original).
11. As written, the conjunction "or" connects the infinitive "to avoid" with the infinitive "to mitigate"; had the legislature intended "avoid an injury" and "mitigate damages" to be related concepts (*i.e.*, alternate objects of "to" rather than alternate objects of "failure"), then inclusion of the second "to" would seem to be improper.
12. Unif. Comparative Fault Act, sec. 1, cmt., 12 U.L.A. 128 (1977).
13. *Kocher*, 787 N.E.2d at 429.
14. J.G. Sutherland, *Law of Damages* sec. 149, at 459 (4th ed. 1916).
15. Restatement (Third) of Torts, Topic 5, sec. 26, at 320 (2001). Though the Restatement does not discuss the issues raised in this article, it does include an illustration showing separate fault allocation against the same defendant for the plaintiff's property damage following an automobile collision and for the plaintiff's personal injuries resulting from said collision. *See id.*, Illustration 1, at 321-22.
16. *Kocher*, 787 N.E.2d at 430 (Vaidik, J., dissenting).
17. 804 N.E.2d 760 (Ind. 2003).

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