



SEAT BELT EVIDENCE ADMITTED? How to Charge the Jury: An Analysis of Apportionment after *Nabors v. Romero*

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On February 13, 2015, Justice Brown released the Texas Supreme Court's unanimous opinion in *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142. The decision effectively overruled over 40 years of law that deemed seat belt evidence inadmissible in civil trials.

A) Historical Context:

The Texas Supreme Court first ruled that failure to use a seat belt was inadmissible in car-accident cases in 1974. *Carnation Co. v. Wong*, 516 S.W. 2d 116 (Tex. 1974). Part of the reasoning behind *Carnation* was the contributory negligence bar that then existed. See *Nabors* at *1. Put simply, the all or nothing scheme that existed at the time seemed overly harsh if evidence of failure to use a seat belt was admitted. *Id.* Moreover, the Court reasoned that the failure to use a seat belt did not cause a car accident but may only exacerbate a plaintiff's injuries. *Id.* The Legislature joined in the ban in 1985 and statutorily prohibited the introduction of use or nonuse of seat belts in civil cases in 1985. See Act of June 15, 1985, 69th Leg., R.S., ch. 804, § 1, sec. 107C, 1985 Tex. Gen. Laws 2846, 2846-47, repealed by Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1870, 1870-71. The new law stated "[u]se or nonuse of a safety belt is not admissible evidence in a civil trial." *Id.* In 2003 (as part of the sweeping House Bill 4 tort-reform legislation), the Legislature repealed the prohibition but stood silent on the admissibility issue. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 9.01, 2003 Tex. Gen. Laws 863 (repealing Tex. Transp. Code §§ 545.412(d), 545.413(g)). Therefore, *Carnation* stood alone without the support of a stricter statutory prohibition. This brings us to *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, in which the Texas Supreme Court overruled the holding in *Carnation* and held that relevant evidence of use or nonuse of seat belts is admissible "for the purpose of apportioning responsibility in civil lawsuits." See *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, *2.

B) Analysis of Effect on Jury Charge Post-*Nabors v. Romero*:

Assuming you succeed in properly admitting seat belt evidence, how should you now charge the jury as to apportionment of responsibility?

Currently, Texas Civil Practices and Remedies Code Section 33.003(a) provides:

"The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:

- (1) each claimant;*
- (2) each defendant;*
- (3) each settling person; and*
- (4) each responsible third party who has been designated under Section 33.004."*

In *Nabors v. Romero*, Justice Brown expounded upon the language in CPRC 33.003 and said "the directive is clear---fact-finders should consider each person's role in causing, "in any way," harm for which recovery of damages is sought." *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, *15. The Court posed the question of whether the "sharp distinction" drawn in *Kerby v. Abilene Christian College* between occurrence-causing and injury-causing negligence was still viable in light of the current legislative language. *Id.* (referencing *Kerby v. Abilene Christian College*, 503 S.W.2d 526, 526 (Tex. 1973)). Put simply, can a plaintiff's failure to use a seat belt, though not the cause of the "accident", limit his recovery if shown that the non-use caused or contributed to his "injuries"? See *Id.*

First, the Court considered whether to treat the evidence as a failure to mitigate damages - a doctrine typically applied to post-occurrence action (i.e. failure

to seek reasonable care and treatment). *Id.* However, the Court concluded that historically it has proved difficult to instruct juries on failure to mitigate when applied to pre-occurrence actions. *Id.* at *16.

Instead, Justice Brown made it clear that the previous holdings (that a plaintiff's injury-causing negligence cannot reduce a plaintiff's recovery) cannot stand if today's proportionate-responsibility statute contradicts those precedents. *Id.* at *19. And "it does." *Id.*

The Court pointed out a valid distinction when stating that "plaintiffs do not sue simply because they were involved in a car accident; they sue because they suffered damages for which they have not been compensated." *Id.* at *21. The question is not simply who caused the car accident, but who caused the plaintiff's injuries. *Id.* at *22. Therefore, failure to use a seat belt is one way in which a plaintiff can "cause or contribute to cause in any way" his own "personal injuries" or "death" Tex. CIV. PRAC. & REM. CODE 33.003(a), 33.011(4).

The Court went on to state the following:

"[O]ur holding should likewise not introduce any confusion into how to construct a jury charge when seat-belt evidence or any other pre-occurrence, injury-causing conduct is admitted. *Nabors Well Services, Ltd. v. Romero*, 2015 WL 648858. Under section 33.003(a), the fact-finder may consider relevant evidence of a plaintiff's failure to use a seat belt as a "negligent act or omission" or as a violation of "an applicable legal standard" in cases where the plaintiff was personally in violation of an applicable seat-belt law. And in cases in which an unrestrained plaintiff was not personally in violation of a seat-belt law, the fact-finder may consider whether the plaintiff was negligent under the applicable standard of reasonable care. *Nabors Well Services, Ltd. v. Romero*, 2015 WL 648858. This scenario is likely to arise when children are among the passengers of the plaintiff's vehicle. Most children do not violate seat-belt laws by failing to restrain themselves; rather, it is the driver upon whom the law places the responsibility to properly restrain them. Nonetheless, a minor is still held to the degree of care that would be exercised by an "ordinarily prudent child of the same age, intelligence, experience and capacity...under the same or similar circumstances." The jury may further apportion third-party responsibility to the person upon whom the law places the burden to properly restrain the child. *Nabors Well Servs. v. Romero*, 2015 Tex. LEXIS 142, *25-6.

In conclusion, we should continue using a single apportionment question. *Id.* at *27. It is my opinion, along with others, that the Court's language as to the continued

use of a single apportionment question could be interpreted to mean that there should be a single apportionment question "per plaintiff." Regardless, the jury can now consider a plaintiff's pre-occurrence, "injury-causing" conduct alongside his and other persons' "occurrence-causing" conduct. *Id.*

The tell-all question is who could be considered responsible, based upon the evidence, for the "harm" for which the plaintiff seeks to recover. The answer, as it relates to failure to wear a seat belt, is as follows:

- All persons 15 years or older have the responsibility to belt themselves anywhere in the vehicle;
- Drivers have the responsibility to belt all passengers under the age of 17;
- Parents may have a responsibility to belt their children even if they were not the driver. See Texas Family Code sections 151.001, 153.074, and 153.133; and
- Children have a "child's" duty/responsibility to belt themselves.

On the pages that follow, you will find three separate factual scenarios involving non-use of seat belts. For each scenario, I have outlined what I believe to be a proper apportionment question that would follow the initial negligence question. Following each sample apportionment question is an analysis/explanation of each scenario.

C) Apportionment Examples

SCENARIO #1

Plaintiff driving a vehicle with no passengers. Plaintiff collides with Defendant Driver. Plaintiff was unrestrained.

Plaintiff Driver

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or

proximately contributed to cause in any way the harm for which recovery of damages is sought by **Plaintiff Driver**. find the percentage of responsibility, if any, attributable to each:

- a) Defendant Driver _____
- b) Plaintiff Driver _____
- TOTAL: 100%

Analysis:

➤ **As to Plaintiff Driver**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident and 3) negligence of Plaintiff driver as it relates to his failure to wear his seat belt and how said failure caused or contributed to, in any way, the harm for which recovery is sought.

SCENARIO #2

Plaintiff driving a vehicle with Passenger Wife and their 10 y/o child. The Plaintiffs' vehicle collides with Defendant's vehicle. All three occupants of the Plaintiffs' vehicle were unrestrained at the time of the accident.

Plaintiff Driver

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Plaintiff Driver**, find the percentage of responsibility, if any, attributable to each:

- c) Defendant Driver _____
- d) Plaintiff Driver _____
- TOTAL: 100%

Passenger Wife

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Passenger Wife**, find the percentage of responsibility, if any, attributable to each:

- a) Defendant Driver _____
- b) Plaintiff Driver _____
- c) Passenger Wife _____
- TOTAL: 100%

Minor Child

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Minor Child**, find the percentage of responsibility, if any, attributable to each:

- a) Defendant Driver _____
- b) Plaintiff Driver _____
- c) Passenger Wife _____
- d) Minor Child _____
- TOTAL: 100%

Analysis:

- **As to Plaintiff Driver**, the jury should apportion in the same way as described in Factual Scenario #1 as to Plaintiff Driver's harm for which recovery is sought.
- **As to Passenger Wife**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident and 3) negligence of Plaintiff Wife as it relates to her failure to wear her seat belt and how said failure caused or contributed to, in any way, the harm for which recovery is sought.
- **As to Minor Child**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident AND as it relates to his failure to buckle Minor Child, 3) negligence of Passenger Wife as it relates to her failure to buckle her Minor Child and 4) negligence of Minor Child for a child's duty to buckle self. *In practice, consideration should be given to the strategy of not submitting the Minor Child and focusing mainly on the responsibility of Plaintiff Driver and Passenger Wife, depending upon the age of the child.*

SCENARIO #3

Plaintiff driving a vehicle with Passenger Wife, an unrelated Adult Passenger and Adult Passenger's 10 y/o child (Minor Child)(Minor Child is unrelated to Plaintiff Driver and Passenger Wife). The Plaintiffs' vehicle collides with Defendant's vehicle. All four occupants of the Plaintiffs' vehicle were unrestrained at the time of the accident.

Plaintiff Driver

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Plaintiff Driver**, find the percentage of responsibility, if any, attributable to each:

- e) Defendant Driver _____
- f) Plaintiff Driver _____
- TOTAL: 100%

Passenger Wife

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Passenger Wife**, find the percentage of responsibility, if any, attributable to each:

- g) Defendant Driver _____
- h) Plaintiff Driver _____
- i) Passenger Wife _____
- TOTAL: 100%

Adult Passenger

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Adult Passenger**, find the percentage of responsibility, if any, attributable to each:

- a) Defendant Driver _____
- b) Plaintiff Driver _____
- c) Adult Passenger _____
- TOTAL: 100%

Minor Child (child of Adult Passenger)

If you answered "Yes" to Question No.1 for any of those named below, then answer the following question. Otherwise, do not answer the following question. Assign percentages of responsibility only to those you found caused or contributed to cause in any way the harm for which recovery of damages is sought. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

For each person you found proximately caused or proximately contributed to cause in any way the harm for which recovery of damages is sought by **Minor Child (child of Adult Passenger)**, find the percentage of responsibility, if any, attributable to each:

- a) Defendant Driver _____
- b) Plaintiff Driver _____
- c) Adult Passenger _____
- d) Minor Child _____
- TOTAL: 100%

Analysis:

- **As to Plaintiff Driver**, the jury should apportion in the same way as described in Factual Scenario #1 as to Plaintiff's harm for which recovery is sought.
- **As to Passenger Wife**, the jury should apportion in the same way as described in Factual Scenario #2 as to Passenger Wife's harm for which recovery is sought.

- **As to Adult Passenger**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident, 2) negligence of the Plaintiff Driver as it relates to the accident and 3) negligence of Adult Passenger as it relates to her failure to wear her seat belt and how said failure caused or contributed to, in any way, the harm for which recovery is sought.
- **As to Minor Child (child of Adult Passenger)**, the jury should apportion based upon evidence supporting 1) negligence of the Defendant driver as it relates to the accident. 2) negligence of the Plaintiff Driver as it relates to the accident AND as it relates to his failure to buckle Minor Child. 3) negligence of Adult Passenger as it relates to her failure to buckle her Minor Child and 4) negligence of Minor Child for a child's duty to buckle self. *In practice, consideration should be given to the strategy of not submitting the Minor Child and focusing mainly on the responsibility of Plaintiff Driver and Adult Passenger, depending upon the age of the child.*

E) Conclusion

It should be noted that the above examples are not necessarily the only ways to draft a jury charge considering the factual scenarios and admissible seat belt evidence. Instead, the above is merely a suggestion of what I consider to be the most appropriate method (at the time) considering the language in *Nabors v. Romero*. I hope after reading this article you have a better understanding of how seat belt evidence may affect the jury charge in your particular case.

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