

## Dancing With the Cars

*Do pedestrians really have the right of way? Local laws are weaker than you think.*

By Michael Morgenstern

Pedestrian accidents in the Washington, D.C., metro area are growing. As a pedestrian here, you may legitimately feel as if you're in the cross hairs when trying to cross the street.

According to a recent *Washington Post* article, the D.C. metro area has:

- an average of 90 pedestrians dying each year—that is, about one death every four days;
- an average of 3,000 pedestrian accidents each year—more than eight accidents every day;
- pedestrians involved in 50 percent of all motor vehicle deaths; and
- 40 pedestrian fatalities already this year.

For more than 25 years, I have been representing pedestrians injured by motor vehicles. Over these many years, hundreds of injured pedestrians have come to my office looking for help. Most often, the injuries are very serious. And sometimes my clients can win meaningful victories (as when Mary Best recovered \$3.3 million after a Metro bus crushed both her legs).

Despite these victories, however, I accept very few of these cases, probably one out of 10. The reason that I accept so few cases goes back to the No. 1 myth held by pedestrians: I'm the pedestrian, so I have the right of way.

### NARROW RIGHTS OF WAY

In fact, legal protections for people walking across a street mean almost nothing in the District, Maryland, or Virginia—for two reasons.

First, the statutory language giving the pedestrian the right of way is very, very narrow. Basically, a person has to be in the crosswalk and walking with the light. At an intersection not controlled by traffic signals, the person must be in the crosswalk—whether marked or unmarked—and must have entered the crosswalk at a reasonable distance from the oncoming car.

So if you're walking “between intersections”—that is, outside the crosswalk—and you're hit by a car, you probably will be

considered negligent. The basic reasoning is that you surprised the driver, who doesn't expect pedestrians in the middle of the street, and therefore you didn't give the oncoming vehicle a reasonable distance to stop. In other words, you no longer had the right of way.

If the evidence indicates the person crossed outside the crosswalk and did not look before crossing, the pedestrian is considered *negligent per se*—no matter how egregious the driver's conduct.

### ALL OR NOTHING

Second, such a finding of negligence on the part of the pedestrian can have significant consequences. Maryland, Virginia, and the District (joined by North Carolina and Alabama) are the only “contributory negligence” jurisdictions in the country. In these jurisdictions, if the pedestrian is found to be even 1 percent at fault, he recovers nothing, regardless of the driver's fault. Thus, if a speeding, intoxicated driver strikes a person who is crossing outside the crosswalk without having looked both ways, the victim will be barred from any recovery.

Draconian? For sure.

In contrast, some form of “comparative negligence” is the standard in 46 states. In these jurisdictions, the negligence of the pedestrian is compared with the negligence of the driver. In the majority of these comparative-negligence states, a pedestrian generally can still recover damages even if negligent, as long as his negligence was less than the driver's. And in a minority of comparative-negligence states, the pedestrian can recover damages even if his negligence was greater than the driver's.

Here's how this can play out in our area. I once represented a father who took his young children to see the Christmas Parade of Boats in Annapolis, Md. More than 20,000 people filled the small area near the water's edge to watch the decorated boats, lit for the holiday. The streets leading to the water's edge were open for traffic, even though they were packed with people.

My client was walking outside the crosswalk toward the water's edge (along with hundreds of others). As he was stepping up onto the curb after crossing the street, a tour bus

rounding a corner “clipped” him with one of its back tires, pulling him down and running over him. My client’s injuries were catastrophic. He had to be flown to Fairfax Inova Hospital for specialized surgery to save his leg.

In 46 states, first the trier of fact would determine the percentage of fault borne by each party, and then the victim’s recovery would be reduced by his percentage of fault. If the trier of fact determined that the pedestrian should recover \$100,000 for his injuries but that he was 20 percent at fault for the accident, the pedestrian would receive 80 percent of the \$100,000. Seems fair.

But in contributory-negligence jurisdictions such as Maryland, the District, and Virginia, the trier of fact first determines whether the driver was negligent and then assesses whether the pedestrian contributed to the accident: If he contributed whatsoever, he gets nothing. In this case, because my client was outside the crosswalk when the bus struck him, he had a significant chance of ending up with nothing.

Of course, the defense also had the risk of a jury finding that my client was not negligent at all. The jury’s conclusion might have been that the obvious presence of so many people in the street should have caused the bus driver to slow down to a speed that would have allowed him to avoid striking pedestrians. The mass of people outside the crosswalk gave the bus driver ample warning to avoid the accident.

With these risks in mind, both sides reached a compromise settlement on the eve of trial and avoided the “all or nothing” outcome that a trial would have entailed. Yet this fair compromise is the exception, not the rule, in a contributory-negligence jurisdiction.

The contributory-negligence standard goes back to the days when the law tended to judge situations as black or white: You either contributed to the accident, or you did not. Modern law has tended to recognize the shades of gray present in many accidents, as well as the harshness of denying compensation to an injured party who was partially at fault. Thankfully, the national trend over the past 50 years has been to replace contributory-negligence laws with the comparative-negligence standard.

What’s holding things up in our region? I suspect the auto insurance companies. The current system lets these insurers pay less to injured pedestrians overall than they would pay under a system of comparative negligence. They thus have little incentive to change this favorable regime and plenty of reason to oppose reform.

### NO FORCE FIELD

Let me turn from law and talk about practical reality for a moment. People crossing the street seem to act as if they believed in a myth: “I’m in the crosswalk, so I’m safe.”

Yet sometimes people who have the right of way are still injured. Why? When the walk sign flashes, most people immediately step off the curb into the crosswalk and brazenly cross the street as though an invisible force field protects them.

I am convinced that the pedestrian injury statistics would not be so high if people stopped challenging motor vehicles when crossing the street. The laws of physics take priority here, and human flesh always loses when struck by a ton of steel.

Crossing the street is like dancing with the cars—there are steps to follow, signals to read, and if these things are not in sync, there’s a collision. Crosswalks and walk signs don’t guarantee that you can step off the curb safely. That walk sign is just an invitation to begin thinking about crossing the street.

Even when you have that walk sign, let your senses protect you. Don’t talk on your cell phone, and stop any other conversations. Don’t step off the curb until you are sure the intersection has cleared and all cars have come to a complete stop. Make eye contact with drivers to confirm that they see you. Check if any vehicle is going to make a right turn on red. And then, once you are in the crosswalk, get to the other side of the intersection as fast as possible.

In short, remember what your mother taught you. She was looking out for you. The law on pedestrians in the District, Maryland, and Virginia isn’t as caring.

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