Helmetless Motorcyclists—Easy Riders Facing Hard Facts: The Rise of the "Motorcycle Helmet Defense"

I. INTRODUCTION

It is common knowledge today that the popularity of the motorcycle[1] has increased dramatically in the United States. Over a twelve year period from 1964 to 1976 the number of registered motorcycles in this country increased over 400 percent.[2] A disheartening but corresponding truism is that as the popularity of the motorcycle increases, so do motorcycle fatalities and severe injuries resulting from accidents.[3] The United States Department of Transportation (USDOT) estimates that more than 350,000 motorcyclists are injured annually and, in 1977 alone, over 4,000 motorcyclists were killed.[4] There are numerous causes for so many fatalities and severe injuries. Some of these, such as road conditions and the negligence of other motorists, are outside a motorcyclist's control. Other causes, however, such as failing to wear a protective helmet, are directly within a motorcyclist's control.

Recognizing this problem, many states—beginning with New York in 1966[5]—enacted laws requiring the use of helmets by motorcycle operators. "Momentum" for this approach was provided by the federal Highway Safety Act,[6] under the authority of which the Secretary of Transportation conditioned the availability of certain federal highway funding on the existence of state helmet-use statutes. By 1975, all but three states[7] had

1. OHIO REV. CODE ANN. § 4511.01(C) (Page Supp. 1978), defines "motorcycle" as:
> [E]very motor vehicle, other than a tractor, having a saddle for the use of the operator and designed to travel on not more than three wheels in contact with the ground, including but not limited to, motor vehicles known as "motor-driven cycle," "motor scooter," or "motorcycle" without regard to weight or brake horsepower.

2. U.S. DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, MOTORCYCLE HELMETS: CLAIMS AND FACTS (DOT HS 802 732 January 1978). In 1976, 5,000,000 motorcycles were registered nationwide, compared to 985,000 in 1964. In Ohio, motorcycle registrations increased from 48,801 in 1964 to 318,103 in 1976. OHIO DEP'T OF HIGHWAY SAFETY, OHIO'S MANDATORY HELMET USE LAW: ITS EFFECT ON THE FATALITY RATE (1977).

3. During the period 1964 to 1976, the number of motorcycle fatalities, both nationwide and in Ohio, tripled. U.S. DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, MOTORCYCLE HELMETS: CLAIMS AND FACTS (DOT HS 802 732 January 1978); OHIO DEP'T OF HIGHWAY SAFETY, OHIO'S MANDATORY HELMET USE LAW: ITS EFFECT ON THE FATALITY RATE (1977).

4. U.S. DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, FACT SHEET: MOTORCYCLE HELMETS—THEY SAVE LIVES AND REDUCE INJURIES. In Ohio there were 185 motorcycle fatalities in 1977. Interview with John R. Pichler, Systems Evaluation Specialist, Ohio Dep't of Highway Safety, in Columbus, Ohio (Oct. 2, 1978).

5. 1966 N.Y. Laws ch. 979 (currently codified, as amended, at N.Y. VEH. & TRAF. LAWS § 381 (McKinney 1970)).

6. Highway Safety Act of 1966, Pub. L. No. 89-564, tit. I, 80 Stat. 731.

7. California never enacted a mandatory helmet-use law. Illinois enacted a law in 1969, 1969 Ill. Laws Pub. Act No. 76-1586, § 11-1404, but that law was declared unconstitutional by the Illinois Supreme Court in People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969). Utah's helmet law, UTAH CODE ANN. § 41-6-107.8 (1970), requires helmet use only on roads with a posted speed limit of greater than 35 miles per hour.

enacted mandatory helmet laws. In 1976, however, the Secretary of Transportation's authority to pressure enactment of helmet laws was withdrawn[8] and states began to repeal their laws in rapid fashion.[9] The consequent increase in the number of helmetless cyclists on the nation's highways has led, not surprisingly, to a higher number of motorcycle-related fatalities and injuries.[10] Lawsuits concerning those deaths and injuries have presented complex legal claims and defenses directed at imposing legal responsibilities on riders who choose to ride helmetless. It is with these legal issues that this article is concerned.

The discussion in the article will be presented in the context of a hypothetical personal injury suit brought by a motorcyclist against a negligent motorist. The inquiry centers on whether the cyclist's failure to wear a helmet should constitute a defense that would limit or preclude entirely his recovery. The hypothetical fact pattern is typical of motorcycle accident cases:

> *P*, a fairly experienced motorcyclist, decides on a Sunday afternoon to take a leisurely ride around his community on his motorcycle. He decides not to wear his protective helmet. As *P* is riding at the legal rate of speed on Main Street, *D*, a fairly experienced motorist, is driving his automobile on Central Street, approaching the intersection of Main and Central. The intersection is controlled by a stop sign on Central Street, but *D* negligently fails to yield to it and, as a result, collides with *P*. Upon impact, *P* is catapulted from his motorcycle, his head strikes the pavement and he sustains permanent brain damage as a result. After examination, doctors determine that *P*'s head injuries were the only substantial injuries sustained, and that had *P* been wearing a helmet, the injury to his head would have been substantially less serious. Later, *P* brings suit against *D*, claiming damages for the injuries he sustained.

The analytical viewpoint of the article is that of defense counsel representing the negligent motorist, *D*. Defense counsel should generally consider three possible theories upon which to posit a "motorcycle helmet defense." First, that under a contributory negligence theory, *P*'s failure to wear a helmet was a violation of the jurisdiction's mandatory helmet-use law and, consequently, constituted contributory negligence per se, or, in the absence of such a statute, that *P*'s conduct nonetheless constituted common-law contributory negligence. Second, that *P*'s failure to wear a helmet constituted an assumption of the risk. Third, under a diminution of damages theory, that *P*'s failure to wear a helmet substantially contributed to his injuries and, therefore, precludes his recovering for those damages he could have mitigated or avoided by wearing a helmet.

Before undertaking this analysis it will be necessary in the first part of the article to provide a brief explanation of the historical background and

8. Highway Safety Act of 1976, Pub. L. No. 94-280, tit. II, 90 Stat. 451 (1976). *See* note 37 and accompanying text *infra*.

9. *See* notes 39-43 and accompanying text *infra*.

10. *See* notes 44-47 and accompanying text *infra*.

development of the mandatory helmet-use laws. The second part of the article will present the current case-law status of the "motorcycle helmet defense" and this writer's view of its future trend. Finally, the article will set forth and assess the possible theories defense counsel may employ in establishing the "motorcycle helmet defense," and the extent to which he might expect to succeed with each.

II. HISTORICAL BACKGROUND OF HELMET LAWS

A. *The "Birth" of Helmet-Use Laws*

In 1966, the New York legislature enacted the first mandatory helmet-use legislation,[11] prohibiting any person from riding a motorcycle without wearing approved protective headgear.[12] In the same year, the United States Congress passed the Highway Safety Act,[13] which required each state to implement a highway safety program conforming with standards to be set by the Secretary of Transportation. The Act also contained sanction provisions authorizing the Transportation Department to withhold certain federal highway funds from those states that did not comply with the Secretary's standards.[14] In June of 1967, a Highway Safety Program Standard entitled "Motorcycle Safety" was promulgated by the Secretary requiring the states to enact mandatory helmet-use laws.[15] Prior to 1976, all but three states had substantially complied with the Standard.[16] Ohio's mandatory helmet law became effective on January 1, 1968.[17]

B. *Constitutional Attacks*

Enactment of the various states' helmet laws was quickly followed by

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11. 1966 N.Y. Laws ch. 979 (currently codified, as amended, at N.Y. VEH. & TRAF. LAW § 381 (McKinney 1970).

12. In the Ohio case of State v. Stouffer, 28 Ohio App. 229, 276 N.E.2d 651 (1971), the court, construing "protective helmet" as used in Ohio's helmet statute, stated:

> Webster's Third New International Dictionary defines "helmet" as "any of various protective head coverings usually made of hard material (as metal, heavy leather, fiber) to resist impact and supported by bands that prevent direct contact with the head for comfort and ventilation." The soft cap appellant was wearing is not included in that definition.

28 Ohio App. at 231, 276 N.E.2d at 653-54, *construing* OHIO REV. CODE ANN. § 4511.53 (Page 1973).

13. Highway Safety Act of 1966, Pub. L. No. 89-564, tit. I, 80 Stat. 731.

14. *Id.* § 402(c). The Secretary of Transportation was directed to withhold 100% of a state's federal highway safety funds and 10% of its highway construction funds if that state did not implement an approved highway safety program by early 1969. *Id.*

15. 23 C.F.R. § 1204.4 (1979).

16. *See* note 7 *supra.*

17. 1968 Ohio Laws 1642 (codified at OHIO REV. CODE § 4511.53 (Page 1973, amended 1978)) provided:

> No person shall operate a snowmobile, or a motorcycle on a highway, or be a passenger on a snowmobile or a motorcycle, unless wearing a protective helmet on his head, with the chin strap properly fastened, and using safety glasses or other protective eye device. Such helmet, safety glasses, or other protective eye device shall conform with regulations prescribed and promulgated by the director of highway safety. The provisions of this paragraph or a violation thereof shall not be used in the trial of any civil action.

constitutional challenges. Although a majority of courts have upheld the laws as being within the purview of the states' police power[18] a minority of decisions hold otherwise.[19]

The arguments claiming the laws are unconstitutional[20] have generally followed two lines of reasoning. First, it has been argued that the laws are an improper exercise of a state's police power since they do not legitimately relate to the health, safety, and welfare of the public but only to that of an individual motorcyclist (the "ends" argument).[21] Thus, the opponents of the laws view the issue as being one of "freedom of choice" and contend that the legislation is an unwarranted infringement on a motorcyclist's personal liberty.[22] Second, it has been asserted that the helmet laws are an unreasonable means of carrying out a state's alleged purpose (the "means" argument). This attack includes arguments such as the following: that the laws violate equal protection norms;[23] that they are an infringement on the right to travel;[24] and that they are unreasonable because they are ineffective in remedying any perceived problems.[25]

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18. *See, e.g.*, Commonwealth v. Howie, 354 Mass. 769, 238 N.E.2d 373 (1968); State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (1968); State *ex rel.* Colvin v. Lombardi, 241 A.2d 625 (R.I. 1968); People v. Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290 (1967); People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797 (1967). *See also* note 103 and accompanying text *supra*.

19. *See, e.g.*, Everhardt v. City of New Orleans, 208 So. 2d 423 (La. Ct. App. 1968); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968), *rev'd sub nom.* City of Adrian v. Poucher, 398 Mich. 316, 247 N.W.2d 798 (1976); People v. Smallwood, 52 Misc. 2d 1027, 277 N.Y.S.2d 429 (1967), *rev'd sub nom.* People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (1968); State v. Stouffer, 28 Ohio App. 2d 229, 276 N.E.2d 651 (1971); State v. Betts, 21 Ohio Misc. 175, 252 N.E.2d 866 (Franklin County Mun. Ct. 1969). *See also* Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355, 355 n.7 (1969).

20. For an excellent discussion concerning the constitutionality of helmet laws, see Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST L.J. 355 (1969). *See also* Annot., *Validity of Traffic Regulations Requiring Motorcyclists to Wear Protective Headgear*, 32 A.L.R.3d 1270 (1970).

21. American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968). The Michigan court said: "This statute has a relationship to the protection of the individual motorcyclist from himself, but not to the public health, safety and welfare . . . . The precedential consequences of 'stretching our imagination' to find a relationship to the public health, safety and welfare, require the invalidation of this statute." *Id.* at 355, 158 N.W. 2d at 76-77. In People v. Carmichael, 53 Misc. 2d 584, 279 N.Y.S.2d 272 (1967), the New York court said: "[T]he police power does not authorize statutes requiring a citizen to protect his own physical well being." *Id.* at 590, 279 N.Y.S. 2d at 278.

22. *See, e.g.*, People v. Smallwood, 52 Misc. 2d 1027, 1028, 277 N.Y.S.2d 429, 432 (1967) ("The statute . . . simply removes from the individual the right to exercise his judgment, or preference, in the use of personal adornment, even though capricious."); State v. Betts, 21 Ohio Misc. 175, 177, 252 N.E.2d 866, 868 (Franklin County Mun. Ct. 1969) (" 'Liberty' . . . means 'the right to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are *necessary* for the common welfare (emphasis in original)' ").

23. The equal protection argument is that the government has unreasonably classified motorcyclists and unjustly regulated them on that basis. In Everhardt v. City of New Orleans, 208 So. 2d 423 (La. Ct. App. 1968), the court agreed, stating: "Further, we conclude the ordinance also denies plaintiffs the equal protection of laws in that it imposes undue restrictions on one class of the motoring public without any salutary effect to the public at large." *Id.* at 426.

24. *See* Love v. Bell, 171 Colo. 27, 465 P.2d 118 (1970).

25. Those opposing motorcycle helmet laws have attacked the efficacy of helmets on primarily three grounds: (1) that helmets can themselves cause the neck and spinal injuries found in injured, helmeted cyclists; (2) that helmets dangerously restrict a rider's peripheral vision; and (3) that helmets dangerously reduce a cyclist's hearing. These claims, however, are seriously undercut by numerous

Prior to its repeal,[26] the constitutionality of Ohio's helmet law had been tested in three different state courts, with varying results. In *State v. Craig*,[27] the Court of Appeals for Seneca County found the statute to bear "a real and substantial relation to the public health and general welfare and . . . thus [to be] a valid exercise of the [state's] police power . . . ."[28] Similarly, the Court of Appeals for Franklin County, in *State v. Stouffer*,[29] held that the police power is broad enough to include, as a legitimate interest, protection of individuals from the consequences of their own carelessness.[30] In *State v. Betts*,[31] however, a Franklin County Municipal Court judge found the *Craig* analysis "remote, tenuous, and speculative"[32] and, refusing to follow it, held the Ohio statute to be beyond the police power of the state.[33]

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reports and studies advocating the effectiveness of helmets in reducing head injuries. *See, e.g.*, MARYLAND MOTOR VEHICLE ADMINISTRATION, OFFICE OF HIGHWAY SAFETY PROGRAMS, A REVIEW OF CONFLICTING REPORTS CONCERNING THE SAFETY OF MOTORCYCLE HELMETS (Dec. 1969) (memorandum prepared for the Maryland General Assembly); AMERICAN MEDICAL ASSOCIATION, HEAD PROTECTION OF THE CYCLIST (April 1977); Hames & Petrucelli, *What the Experts Think about Motorcycle Helmets*, TRAFFIC SAFETY, Sept. 1971, at 26; UNITED STATES DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, MOTORCYCLE SAFETY—THE CASE FOR HELMET USE (DOT HS-801 836 Feb. 1976); UNITED STATES DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, FIELD OF VIEW WITH AND WITHOUT MOTORCYCLE HELMETS (Technical Report Oct. 1975); UNITED STATES DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, EFFECT ON SAFETY HELMETS ON AUDITORY CAPABILITY (DOT HS-801 759 Sept. 1975).

26. 1978 LAWS OF OHIO 5-47 (Baldwin). Section 4511.53, as amended, reads in pertinent part:

> No person shall operate or be a passenger on a snowmobile or motorcycle without using safety glasses or other protective eye device. No person who is under the age of eighteen years, or who holds a motorcycle operator's endorsement or license bearing a "novice" designation that is currently in effect as provided in section 4507.13 of the Revised Code, shall operate a motorcycle on a highway, or be a passenger on a motorcycle, unless wearing a protective helmet on his head, and no other person shall be a passenger on a motorcycle operated by such a person unless similarly wearing a protective helmet . . . . The provisions of this paragraph or a violation thereof shall not be used in the trial of any civil action.

OHIO REV. CODE ANN. § 4511.53 (Supp. 1979) (eff. July 10, 1978).

27. 19 Ohio App. 2d 29, 249 N.E.2d 75 (1969).

28. *Id.* at 32, 249 N.E.2d at 78. The court went on to explain:

> We believe that with the great increase of motorcycles on the highways, a motorcyclist who loses control of his vehicle because he is struck on his bare head by an object, constitutes a hazard to other users of the highway who may be struck by a motorcycle which has gone out of control.

Id.

29. 28 Ohio App. 2d 229, 276 N.E.2d 651 (1971).

30. The court stated:

> [T]he state of Ohio has a legitimate concern for the protection of a motorcyclist and passenger when using public roads. The legislation is reasonably related to reducing deaths and injuries. The motorcycle operator and passenger are susceptible to greater danger on modern highways than other motor vehicles. This type vehicle provides less protection for the driver and passenger. Further, there are human effects of personal losses, as well as economic consequences, such as time lost from work, increased insurance rates and property damage, among others.

Id. at 233, 276 N.E.2d at 654.

31. 21 Ohio Misc. 175, 252 N.E.2d 866 (1969).

32. *Id.* at 183, 252 N.E.2d at 871.

33. The court reasoned that the statutory requirement of wearing a helmet would not alleviate any real and substantial public danger and that

> [i]ncluded in a man's "liberty" is the freedom to be as foolish, foolhardy or reckless as he may

C. *The "Death" of Helmet-Use Laws*

From the time the Highway Safety Act of 1966 was enacted and mandatory helmet laws were required by the Transportation Department, interest groups representing motorcycle enthusiasts vehemently expressed their opposition.[34] Although forty-seven of the fifty states enacted helmet statutes in one form or another, the conflict grew intense between the federal government and the three states (California, Illinois, and Utah) that had refused to enact legislation.[35] In 1975, the Transportation Department began sanction proceedings against these states, the result of which would have been withdrawal of substantial federal highway funding.[36] Those proceedings were thwarted when Congress passed the Highway Safety Act of 1976,[37] which withdrew from the Secretary of Transportation the authority to require state helmet-use laws.[38]

The 1976 Act made it inevitable that a number of state legislatures would repeal their helmet laws as legislators faced increasing pressure from various interest groups and their political constituencies. Arguments based on notions such as "freedom of choice," which had failed to influence most of the courts, began to carry the day in the state legislatures. The repeal movement began quickly and during the remainder of 1976, nine states repealed their helmet statutes.[39] In 1977, the momentum of the movement peaked with fourteen states repealing their statutes,[40] and in 1978, four

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wish, so long as others are not endangered thereby. The State of Ohio has no legitimate concern with whether or not an individual cracks his skull while motorcycling. That is his personal risk.

Id. at 185, 252 N.E.2d at 872.

34. *See, e.g.*, N.Y. Times, June 28, 1976, at 50, col. 6 (thousands of motorcyclists demonstrate at Wisconsin state capitol). The American Motorcyclist Association (AMA) was the primary lobbyist against helmet laws. Gary Winn, that organization's legislative analyst, noted that "[t]he AMA has always urged the use of good quality safety gear . . . . Helmets are the most important and crucial part of that gear . . . . So we urge the voluntary use of helmets while we oppose laws governing their use." *Motorcyclist Association Urges Use of Helmets*, in 2 OHIO TRAFFIC SAFETY EDUCATION CENTER, NEWSLINE 4 (No. 2, June 1978).

35. N.Y. Times, Dec. 29, 1975, at 39, col. 3.

36. *Why Motorcycle Deaths are Soaring*, U.S. NEWS & WORLD REPORT, Sept. 4, 1978, at 35, 36.

37. Pub. L. No. 94-280, tit. II, 90 Stat. 451 (1976).

38. *Id.* § 208(a). The amendment to this effect was offered by Senator Alan Cranston of California—which was in danger of losing $50 million in federal highway funding. 121 CONG. REC. 40261 (Dec. 21, 1975).

39. 1976 Alaska Sess. Laws ch. 230.31 (amending ALASKA STAT. § 28.35.245 (Michie 1978) to apply only to minors); 1976 Ariz. Sess. Laws ch. 57, § 2 (amending ARIZ. REV. STAT. ANN. § 28-964 (West 1976) (under 18)); 1976 Conn. Pub. Acts 76-326, § 1 (repealing CONN. GEN. STAT. ANN. § 14-289e (West 1970 & Supp. 1977)); 1976 Iowa Acts ch. 1245, § 527 (repealing IOWA CODE ANN. § 321.446 (West Supp. 1979-80)); 1976 Kan. Sess. Laws ch. 51, § 1 (amending KAN. STAT. § 8-1598 (Supp. 1979) (under 16), subsequently amended by 1979 Kan. Sess. Laws ch. 41, § 1 (under 18)); 1976 La. Acts Act No. 671, § 1 (amending LA. REV. STAT. ANN. § 32:190 (West Supp. 1980)); 1976 Okla. Sess. Laws ch. 81, § 1 (amending OKLA. STAT. ANN. tit. 47, § 40-105 (West Supp. 1979) (under 18)); 1976 R.I. Pub. Laws ch. 104, § 1 (amending R.I. GEN. LAWS § 31-10.1-4 (1969) & Supp. 1978)); 1976 S.D. SESS. LAWS ch. 194, § 1 (amending S. D. COMPILED LAWS ANN. § 32-20-4 (1976) (under 18)).

40. 1977 Colo. Sess. Laws 1899, §§ 1, 2 (repealing COLO. REV. STAT. § 42-4.231(2) (1973 & Supp. 1978)); 1977 Haw. Sess. Laws ch. 183, § 1 (amending HAW. REV. STAT. § 286-81 (1976) (under 18)); 1977 Ind. Acts, Pub. L. No. 135, § 1 (repealing IND. CODE ANN. § 9-8-9-3 (Burns 1973)); Me. Acts ch. 22 (repealing ME. REV. STAT. tit. 29, § 1373 (1967)); 1977 Minn. Laws ch. 17, § 2 (amending MINN. STAT.

more states,[41] one of which was Ohio,[42] followed. Only a few states have been successful in turning back repeal efforts.[43]

D. *Statistical Effects of the Repeal Movement*

The most immediate effect of the repeal movement has been, as anticipated by repeal opponents, an increase in the motorcycle fatality rate. The reason, of course, is that without mandatory helmet-use laws, fewer motorcyclists wear helmets and, consequently, a greater proportion of these cyclists sustain fatal or serious head injuries from accidents. The statistical trend has been documented in several recent surveys,[44] the results of which indicate that: (1) in those states that have repealed their helmet-use laws, helmet usage has dropped thirty to forty percent;[45] (2) during the period that federal requirements were in effect, the fatality rate dropped consistently, finally reaching its nadir, five per 10,000 cyclists, in 1976;[46] and (3) motorcycle fatalities have increased in the states that have repealed their helmet laws.[47] While this statistical relationship is an

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ANN. § 169.974 (West Supp. 1980) (under 18)); 1977 Mont. Laws ch. 54, § 1 (amending MONT. REV. CODES ANN. § 61-9-417 (1979) (under 18)); 1977 Neb. Laws, Leg. Bill 314, § 7 (repealing NEB. REV. STAT. § 60-403.02 (1978)); 1977 N.H. Laws ch. 173, § 1 (amending N.H. REV. STAT. ANN. § 263:29-b (Supp. 1979) (under 18)); 1977 N.D. Sess. Laws ch. 355, § 3 (amending N.D. CENT. CODE § 39-10.2-06 (Supp. 1979) (under 18)); 1977 Or. Laws ch. 410, § 291 (amending OR. REV. STAT. § 487.730 (1967) (under 18)); 1977 Tex. Gen. Laws ch. 162, § 1 (amending TEX. REV. CIV. STAT. ANN. art. 6701c-3, § 2 (Vernon 1977) (under 18)); 1977 Utah Laws ch. 267, § 1 (amending UTAH CODE ANN. § 41-6-107.8 (Supp. 1979) (under 18)); 1977 Wash. Laws ch. 355, § 55 (repealing WASH. REV. CODE ANN. § 46.37.530 (1970)); 1977 Wis. Laws ch. 204, § 1 (amending WIS. STAT. ANN. § 347-485 (West 1971) (under 18) (overriding veto)).

41. 61 Del. Laws ch. 314 (1978) (amending DEL. CODE tit. 21, § 4185 (Michie 1979) (over 18 must have helmet in possession, under 18 required to wear)); 1978 Idaho Sess. Laws ch. 323, § 1 (amending IDAHO CODE § 49-761A (1967) (under 18)); 1978 N.M. Laws ch. 35, § 460 (amending N.M. STAT. ANN. § 64-18-55.1, recodified at N.M. STAT. ANN. § 66-7-356 (Michie 1978) (under 18)); *see also* note 42 *infra.*

42. 1978 LAWS OF OHIO 5-47 (Baldwin) (amending OHIO REV. CODE ANN. § 4511.53 (Page 1973 & Supp. 1978) (under 18)).

43. For example, the governors of three states have successfully vetoed helmet repeal efforts—Virginia (in 1977), Maryland (in 1978), and Massachusetts (in 1978) .13 IIHS, THE HIGHWAY LOSS REDUCTION STATUS REPORT, Nos. 8 and 11. In his veto message, Governor Dukakis of Massachusetts said:

> These chilling statistics [citing figures on motorcycle fatalities] clearly outweigh any philosophical arguments that center around each person's presumed right to decide for himself how much risk to life or limb he will take. Such arguments fade into abstraction when measured against the very real tragedy that afflicts the family of each person who dies unnecessarily.

Id. No. 11, at 11. In 1979, the Maryland legislature amended the state helmet statute, MD. TRANSP. CODE ANN. § 21-1306 (1977), to require helmets only on "minors." 1979 Md. Laws ch. 746.

44. The more extensive surveys of nationwide trends have been compiled by the National Highway Traffic Safety Administration (NHTSA), a division of the U.S. Department of Transportation (USDOT), and the Insurance Institute for Highway Safety (IIHS), an independent, non-profit educational and scientific organization supported by the insurance industry. The author would like to thank both organizations for their assistance during the preparation of this article.

45. USDOT, NHTSA, MOTORCYCLE HELMETS: CLAIMS AND FACTS (DOT HS 802 732 January 1978).

46. *Why Motorcycle Deaths are Soaring*, U.S. NEWS & WORLD REPORT, Sept. 4, 1978, at 35.

47. *Deaths, Injuries Mount in Helmet Law Repeal Areas*, 13 INSURANCE INSTITUTE FOR HIGHWAY SAFETY, THE HIGHWAY LOSS REDUCTION STATUS REPORT 7 (No. 12, Aug. 21, 1978). Perhaps the most dramatic illustration of this point is made by the motorcycle fatality statistics for the state of Ohio during the month of July 1978, the month in which the helmet-law repeal took effect. In

important consideration in evaluating the wisdom of the repealing legislatures, it is more pertinent in the context of this article in evaluating the wisdom of the cyclist who chooses to ride helmetless. It is to the legal ramifications of the latter evaluation that the discussion now turns.

III. THE PRESENT STATUS AND PROJECTED TREND OF THE "MOTORCYCLE HELMET DEFENSE"

A. *Existing Case Law*

The "motorcycle helmet defense" is of recent origin and, to date, its use by defense attorneys has been rather infrequent, appearing in only three reported cases. Moreover, virtually no attention has been accorded the defense in law reviews and other legal periodicals.[48]

The first reported case was *Rogers v. Frush*,[49] a 1970 decision handed down by Maryland's court of last resort. A father brought suit on behalf of his minor son for injuries the helmetless son sustained while riding a motorcycle and colliding with a negligent motorist. On appeal from a judgment for plaintiff, defendant claimed the trial court erred in excluding medical testimony[50] offered to prove that: (1) the minor's failure to wear a helmet amounted to contributory negligence; (2) such conduct amounted to his assuming the risk of the consequences of the accident; and (3) because the minor could have avoided the consequences of the collision he should not recover for those injuries that could have been prevented by his wearing a helmet. The court affirmed the judgment for the plaintiff and rejected each of these theories of the "helmet defense."[51]

Responding to the contributory negligence theory, the court relied on the traditional tort doctrine that one is not under a duty to anticipate the negligent acts of another[52] and that "[i]t is not every action on the part of a litigant which an opponent by way of 'second guessing' or hindsight may

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the first nine days of the month, when the requirement was still in effect, six motorcyclists lost their lives, two of whom were not wearing helmets. From the day the repeal took effect to the end of the month, 29 motorcyclists's deaths were reported, 20 of which were helmetless. Interview with John R. Pichter, Systems Evaluation Specialist, Ohio Dep't of Highway Safety, in Columbus, Ohio (Oct. 2, 1978).

48. The only legal commentary discovered by the author's research on the topic is: Annot., 40 A.L.R.3d 856 (1971).

49. 257 Md. 233, 262 A.2d 549 (1970).

50. The proffered testimony was that of a qualified neurosurgeon with expertise in the field of investigating automobile accidents. That witness was willing to testify that had the minor worn a helmet, the chance of his sustaining the injuries would have been reduced by 50% and the chance of suffering a skull fracture would have been reduced by 90%. *Id.* at 237-38, 262 A.2d at 551.

51. Defendant also argued contributory negligence per se on appeal, a theory unavailable to him in the trial court because Maryland's mandatory helmet law was enacted subsequent to the trial court judgment, but prior to the hearing on appeal. The appellate court remarked: "The fact that the General Assembly almost three years after the accident saw fit to require the wearing of such a protective helmet would not be sufficient ground for concluding that as of the time of the accident such a standard of conduct was expected by the general public. . . ." *Id.* at 239, 262 A.2d at 552.

52. The court quoted from another Maryland case, Sanders v. Williams, 209 Md. 149, 120 A.2d 397 (1956):

> One is charged with notice of what a reasonably and ordinarily prudent person would have foreseen and so must foresee what common experience tells may, in all likelihood, occur, and

successfully label as contributory negligence."[53] Also, the court quickly disposed of the assumption of risk theory to the "helmet defense" by refusing to find that the minor *voluntarily* exposed himself to a *known* danger or consented to the defendant's negligent conduct so as to relieve him of his duty to act with due care.[54] Finally, the court ruled that defense counsel's avoidable consequences theory was inapplicable to the facts of the case.[55] Noting that by definition the doctrine of avoidable consequences ordinarily places a duty upon an injured plaintiff to exercise reasonable diligence in avoiding or minimizing the consequences of a defendant's wrong, the court determined the case to be inappropriate for the traditional application of the doctrine, which comes into play and imposes upon a plaintiff a duty to minimize his damages only *after* a defendant has committed the wrongful act.[56] In this situation, the minor's failure to wear a helmet came before the defendant's negligence and, therefore, the minor child could not be charged with a breach of duty when none could be said to exist.

The second reported "motorcycle helmet defense" case, with an almost identical factual pattern, is the 1971 Minnesota Supreme Court decision of *Burgstahler v. Fox*.[57] At the trial level, defense counsel attempted to cross-examine the plaintiff concerning his nonuse of a helmet as a basis for contending that the nonuse caused the plaintiff's partial loss of smell.[58] The trial judge disallowed the questioning and on appeal from a judgment in favor of plaintiff, defendant claimed error by asserting that the "plaintiff was negligent or . . . had assumed the risk of injury because he failed to wear a safety helmet."[59] Although Minnesota was without a mandatory helmet-use statute in effect at the time of the accident, defendant argued the contributory negligence theory of the "helmet defense" on the basis of a city ordinance requiring helmet usage by motorcycle operators of rented machines.[60] In a brief opinion, citing

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to anticipate and guard against what usually happens. On the other hand, one is not bound to anticipate every possible injury that may occur or every possible eventuality.

Id. at 239, 262 A.2d at 552.

53. *Id.* The court relied extensively on the case of Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968), an action for personal injuries in which the defendant sought to invoke the "seat belt defense." That defense, as the name implies, seeks to impose at least partial responsibility for his injuries on the plaintiff, who, at the time of the accident, was not wearing his seat belt. The defense's origin has been traced to Stockinger v. Dunisch, No. ____ (Cir. Ct. Sheboygan Co., Wis. 1964). Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172 (1970) [hereinafter cited as Kircher].

54. 257 Md. at 243, 262 A.2d at 552. *See* text accompanying note 178 *infra*.

55. The *Rogers* court drew heavily on the case of Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1965), in which the court found the doctrine of avoidable consequences inappropriate to the seat belt situation. The *Rogers* court held, by analogy, that it did not apply in the context of the "helmet defense" either.

56. 257 Md. at 240, 262 A.2d at 552-4. *But see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 65, at 423-24 (4th ed. 1971).

57. 290 Minn. 495, 186 N.W.2d 182 (1971).

58. Brief of Defendant-Appellant at 3-5.

59. *Id.* at 3.

60. 290 Minn. at 496, 186 N.W.2d at 183.

Rogers as authority, the court rejected defendant's arguments and found the ordinance inapplicable, since plaintiff owned his motorcycle.[61] Neither defendant nor the court specifically addressed the assumption of risk theory.

The most recent "helmet defense" case is the 1973 case of *Dean v. Holland*,[62] decided by a New York supreme court. The case arose out of a collision between a car and the minor operator of a minibike, which fell within the definition of a motorcycle under New York law. In discovery proceedings, defense counsel moved to depose plaintiff respecting his failure to wear a helmet at the time of the accident. Plaintiff refused to submit to such questioning. On defendant's motion to compel discovery, the court held that plaintiff was required to appear for examination and answer the questions at issue.[63]

Although it is not stated in the opinion what defendant asserted in support of his motion, the court addressed two of the three theories underlying the "helmet defense." The court, noting that New York had a mandatory helmet usage statute in effect at the time of the accident, stated:

> A party violating a statute of this character is chargeable with negligence for its violation provided there is a causal relation between the failure to wear a helmet and the happening of an accident. The court is unable to perceive how a violation of this statute caused or contributed to the causing of the accident, or was a proximate cause of the collision.[64]

The court went on, however, to note that plaintiff's failure to wear a helmet could have been a substantial factor in causing his injuries and, therefore, a jury would be entitled to apportion the damages if sufficient evidence were produced showing that plaintiff could have avoided some or all of the injuries by wearing a helmet.[65] It is unclear from the opinion under which theory of the helmet defense the court would have allowed apportioning of damages.[66]

B. *Present Status and Projected Trend*

Two observations can be made on the basis of these three cases. First, the "motorcycle helmet defense" has seen little use by defense attorneys, and second, its status is anything but settled. Analyzing the three earlier posited theories of the "helmet defense," these tentative conclusions can be drawn from the decisions:

(1) There appears to be no hope for the assumption of risk theory as the *Rogers* court strongly rejected it and the *Fox* and *Holland* courts did not even address it.

61. *Id.* As in *Rogers*, the court in *Fox* refused to consider the applicability of the *state's* helmet-use law, which had become effective before appeal but subsequent to the accident. *Id.*

62. 76 Misc. 2d 517, 350 N.Y.S.2d 859 (1973).

63. *Id.* at 518-19, 350 N.Y.S.2d at 861-62.

64. *Id.* at 519, 350 N.Y.S.2d at 861.

65. *Id.* at 518-19, 350 N.Y.S.2d at 861-62.

66. The case is not further reported and, presumably, it was settled.

(2) The contributory negligence theory appears to have some vitality, but the extent of that vitality is uncertain.
   (a) Common law contributory negligence seems to be unavailable to defense counsel as all three courts rejected it;
   (b) the use of per se contributory negligence was intimated to be viable in the *Rogers* and *Fox* cases,[67] but the *Holland* court rejected it.

(3) There appears to be a split in authority with regard to the mitigation of damages or avoidable consequences theory in reducing plaintiff's recovery. The *Rogers* court explicitly rejected it, but the *Holland* court accepted some form of it. The theory was not proffered or discussed in the *Fox* case.

While the above gives little cause for celebration, defense counsel should not conclude that the "helmet defense" will only on rare occasions yield success. The "helmet defense" will no doubt increase in attention given the fact that the repeal movement has led and will lead to more helmetless riders on our highways. The three cases summarized above can hardly be said to have settled the issues or the law relating to this type of defense. Moreover, the apparent lack of judicial authority may be compensated for by legislative authority. For example, in 1977, apparently in response to the Minnesota Supreme Court's decision in *Fox*, the Minnesota legislature amended that state's helmet statute to allow counsel to introduce evidence of helmet nonuse in order to reduce the cyclist's recovery by an amount attributable to those injuries that could have been avoided by his wearing a helmet.[68] Finally, the probability of successfully asserting the "helmet defense" must be measured in light of recent—mostly favorable—developments relating to its analogous counterpart, the "seat belt defense."[69] Thus, it is much too early to discard or even downgrade the defense as a weapon in defense counsel's arsenal.

The remainder of this article will attempt to answer two primary questions with regard to the "helmet defense": (1) under what tort theories, including the three originally set forth, can defense counsel successfully assert the "helmet defense"; and (2) to what extent can counsel expect to succeed once the "helmet defense" is successfully asserted—in other words, can the plaintiff-cyclist's recovery be totally barred, or only limited?

67. *See* notes 51, 61 *supra*.

68. 1977 Minn. Laws ch. 17, (amending MINN. STAT. ANN. § 169.974(b) (West Supp. 1980)). This amendment provides in part:

> In an action to recover damages for negligence resulting in any head injury to an operator or passenger of a motorcycle, evidence of whether or not the injured person was wearing protective headgear of a type approved by the commissioner shall be admissible only with respect to the question of damages for head injuries. Damages for head injuries of any person who was not wearing protective headgear shall be reduced to the extent that those injuries could have been avoided by wearing protective headgear of a type approved by the commission. For the purposes of this subdivision "operator or passenger" means any operator or passenger regardless of whether that operator or passenger was required by law to wear protective headgear approved by the commissioner.

This amendment may also indicate some "horsetrading" in the legislative halls, since this same act repealed the helmet mandate for cyclists over age 18. *See* note 40 *supra*.

69. *See* note 53 *supra*.

IV. Possible Theories in Asserting the "Helmet Defense"

It is clear that this article's use of the term "helmet defense" is merely a shorthand means of describing a specific factual situation. Remaining is the task of bringing those facts within an accepted legal framework by which the operative effect of their existence can be determined. Unfortunately, a perusal of the cases that pertain to the "helmet" and "seat belt" defenses reveals the lack of succinctly articulated theories upon which the defenses have been asserted.[70] Unless counsel carefully pleads his case, specifically asserting the "helmet defense" in terms readily recognizable to the court, the result might be the court confusing the theories and ultimately striking the defense.

A. *Contributory Negligence*

In order to base a "helmet defense" on the traditional doctrine of contributory negligence, counsel must prove every element of that doctrine. As Dean Prosser points out, four elements must be proved to establish contributory negligence on the part of another: (1) that *P* had a duty to conform to prescribed standard of care, (2) that *P* breached that duty, (3) that *P* sustained actual injuries, and (4) that a causal connection exists between *P*'s breach and his resulting injuries.[71] It is given that *P* sustained grave injuries. Further, by riding helmetless, *P* breached whatever duty to wear a helmet that might be imposed upon him. Remaining is a detailed discussion concerning the imposition of a duty on *P* to wear a helmet and the causal relationship between his failing to do so and his injuries.

1. *Imposing a Duty to Conform to a Reasonable Standard of Care*

a. *Statutory Duty—The Availability of Helmet-Use Statute and Contributory Negligence Per se*

The initial question to be faced by defense counsel contemplating assertion of the "helmet defense" in a case similar to the hypothetical is whether the jurisdiction in which the collision occurred has a mandatory helmet-use statute. If that state is one of the twenty that has retained its statute,[72] or if the accident occurred in a city with an ordinance prescribing helmet use,[73] the plaintiff-cyclist's violation provides counsel with the

70. *See* text accompanying notes 49-66 *supra* and notes 92-93 *infra*.

71. Prosser, *supra* note 56, § 30, at 143.

72. Ala. Code § 32-12-40 (1977); Ark. Stat. Ann. § 75-1703 (Supp. 1975); Fla. Stat. Ann. § 316.211 (West Supp. 1979); Ga. Code Ann. § 68A-1306 (1975); Ky. Rev. Stat. § 189.285 (1971 & Supp. 1978); Mass. Ann. Laws c.90, § 7 (Law. Co-op 1975 & Supp. 1979); Mich. Comp. Laws Ann. § 257.658 (West 1977); Miss. Code Ann. § 63-7-64 (Supp. 1979); Mo. Ann. Stat. § 302.020 (Vernon 1972); Nev. Rev. Stat. § 486.231 (1975); N.J. Stat. Ann. § 39:3-76.7 (West 1973); N.Y. Veh. & Traf. Law § 381 (McKinney 1970); N.C. Gen. Stat. § 20-140.4 (1978); 75 Pa. Cons. Stat. Ann. § 3525 (Purdon 1977); S.C. Code § 56-5-3660 (1977); Tenn. Code Ann. § 59-934 (1968); Vt. Stat. Ann. tit. 23, § 1256 (1978); Va. Code § 46.1-172 (1974); W. Va. Code § 17C-15-44 (1974); Wyo. Stat. § 31-5-116 (Supp. 1979).

73. This writer has no knowledge of an existing helmet ordinance; however, an official at the

following argument: The helmet statute or ordinance prescribes a clear legislative standard of conduct to which a reasonable motorcyclist would adhere in protecting himself, and *P*'s deviation from this standard in violating the statute was contributory negligence as a matter of law.[74] As persuasive as this approach first sounds, there are, nonetheless, a number of other considerations requiring counsel's attention before the "helmet defense" can be successfully employed under this theory.

First, the statute, in addition to prescribing certain types of conduct with regard to the wearing of a helmet, may expressly exclude the imposition of civil liability for a violation of the statute. For example, both the original and the existing Ohio helmet statute state that "the provisions of [the statute] or a violation thereof shall not be used in the trial of any civil action."[75]

Second, even without any express statement concerning civil liability a court must determine whether the helmet statute has any bearing upon the standard of care required of a plaintiff-cyclist. In other words, counsel must realize that although the jurisdiction may have a helmet statute, the court facing a civil action is not required to adopt or borrow it in setting the standard of care for a reasonable cyclist. The plaintiff's failure to conform with a highway safety statute simply may not constitute negligent conduct in the eyes of the court.

The Restatement (Second) of Torts provides some guidelines and outlines the ultimate issues in this context.[76] In the hypothetical case, for example, the issues defense counsel must address are twofold: (1) whether *P* is within the class of persons that the statute is intended to protect, and (2) whether the injuries to *P* are the risks the statute is designed to preclude. Analyzing these issues, one is led to the conclusion that the statute is, in fact, intended to protect motorcyclists from substantial head injuries resulting from accidents. The legislative history of the 1968 federal

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Ohio Highway Safety Department indicated that at one time the city of Youngstown considered this type of ordinance. Interview with Georgia Jupinko, *infra* note 78. There is a city ordinance in the small Ohio city of Brooklyn requiring drivers and passengers of motor vehicles to wear seat belts, reported in 10 FOR THE DEFENSE 27 (1967).

74. *See* PROSSER, *supra* note 56, § 36, at 202-03 for a discussion of the basic premise. RESTATEMENT (SECOND) OF TORTS § 463 (1965) defines contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about plaintiff's harm."

75. OHIO REV. CODE ANN. § 4511.53 (Page 1973 & Supp. 1979). *See also* N.C. GEN. STAT. § 20-140.4 (1978) (cannot use for either common law or per se). *But cf.* MINN. STAT. ANN. § 169-974(b) (West Supp. 1980) (expressly requiring an apportioning of damages, if causation is proved when violation is shown), note 68 *supra*.

76. RESTATEMENT (SECOND) OF TORTS § 286 (1965) provides:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and
(b) to protect the particular interest which is invaded, and
(c) to protect that interest against the kind of harm which has resulted, and
(d) to protect that interest against the particular hazard from which the harm results.

mandate,[77] the primary debates within the state legislatures,[78] and the language of the courts upholding the constitutionality of state helmet statutes have explicitly reflected this.[79]

The language and holdings in the previously mentioned helmet cases indicate that courts are willing to accept this characterization of mandatory helmet laws, if properly presented. The *Holland* court found New York's helmet statute to impose a statutory standard of conduct upon the cyclist,[80] while the courts in *Rogers* and *Fox* implied that if a helmet statute had been in effect at the time of the accident, it would have established the standard of care.[81] Further support can be found in the seat belt cases. Although states have seat belt installation statutes,[82] there are no general mandatory seat belt usage statutes in existence.[83] Because of this, courts entertaining the "seat belt defense" are not willing to find, as a matter of law, a beltless motorist in breach of a particular standard of conduct expected of ordinary motorists.[84] There are dicta in these cases, however, strongly suggesting that if belt-usage statutes existed, they would establish the standard of care in civil cases.[85]

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77. 23 C.F.R. § 1204.4 (1979). The stated purpose of the Secretary's regulation was "[t]o assure that motorcycles, motorcycle operators, and their passengers meet standards which contribute to safe operation and protection against injuries." The Secretary's findings included the following:

> Deaths and injuries from motorcycle accidents doubled between 1963 and 1965. This fact is particularly alarming when it is understood that most of those killed and injured were young people under the age of 25. Motorcycle registrations have jumped from 574,080 in 1960 to 1,914,700 in 1966. By 1970 the annual increase is expected to reach 1 million per year. Motorcycle safety takes on grave dimensions in view of the fact that since 1960 the rate of motorcycle fatalities has increased at about the same rate as the number of motorcycles.

USDOT/FEDERAL HIGHWAY ADMINISTRATION, STAFF MEMORANDUM ON THE CONSTITUTIONAL QUESTION PRESENTED BY STATE MOTORCYCLE HEADGEAR REQUIREMENTS (Jan. 1970).

78. The Ohio General Assembly was particularly interested in protection of the cyclist. Interview with Georgia Jupinko, Ohio Dep't of Highway Safety, in Columbus, Ohio (Nov. 6, 1978).

79. *See, e.g.*, note 30 *supra.*

80. *See* text accompanying note 64 *supra.*

81. *See* notes 51, 61 and accompanying text *supra.*

82. As of 1974, 34 states and the District of Columbia had seat belt installation statutes. Hoglund & Parsons, *Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law*, 50 WASH. L. REV. 1, 7 n.19 (1974). *See, e.g.*, OHIO REV. CODE ANN. § 4513.262 (Page 1973).

83. Many state legislatures, including Ohio, have considered enacting mandatory seat belt usage laws. There are some statutes requiring seat belt usage in certain circumstances, *e.g.*, CAL. VEHICLE CODE § 27304 (West 1971) (drivers and passengers in driver's training autos); R. I. GEN. LAWS § 31-23-41 (1968) (drivers of public service vehicles).

It has been suggested that the seat belt installation statutes implicitly require belt use. *See* Amend v. Bell, 89 Wash. 2d 124, 139, 570 P.2d 138, 147 (1977) (Horowitz, J., dissenting); Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288, 289. Courts, however, have uniformly rejected this proposition. *See, e.g.*, Bertsch v. Spears, 20 Ohio App. 2d 137, 252 N.E.2d 194 (1969); Roberts v. Bohn, 26 Ohio App. 2d 50, 269 N.E.2d 53 (1971); and note 85 *infra.*

84. Lawrence v. Westchester Fire Ins. Co., 213 So. 2d 784 (La. Ct. App. 1968); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967); Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164 (1974); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

85. In Roberts v. Bohn, 26 Ohio App. 2d 50, 58, 269 N.E.2d 53, 59 (1971), the court stated: "We conclude that in the absence of any statute to the contrary, there is no duty on the part of an occupant of an automobile to anticipate another's negligence and to protect his own safety by such precautions as wearing available seat belts." And, in Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, (1974), the New York Court of Appeals said:

> Since section 383 of the Vehicle and Traffic Law does not require occupants of a

Once a court agrees to adopt a helmet statute as prescribing the standard of care, a third consideration for counsel is the weight the court will place on the statute's violation. In other words, the issue focuses on whether, in that jurisdiction, the violation of a highway safety statute is negligence per se or merely evidence of negligence.[86] If a violation constitutes negligence per se, the use of the per se theory in asserting the "helmet defense" can carry the day for defense counsel. But if a statutory violation is merely evidence of negligence, counsel's task in successfully asserting the "helmet defense" becomes more difficult, since he must also argue common-law contributory negligence.[87]

The fourth and final consideration in evaluating the efficacy of the per se theory in a particular case is whether the motorcyclist had a reasonable excuse for violating the statute. The Restatement (Second) of Torts sets forth specific criteria by which to determine whether a violation of a statute is excused and thus unavailable as evidence of contributory negligence. Specifically, the Restatement would excuse violations when:

(a) the violation is reasonable because of the actor's incapacity;
(b) he neither knows nor should know of the occasion for compliance;
(c) he is unable after reasonable diligence or care to comply;
(d) he is confronted by an emergency not due to his own misconduct;
(e) compliance would involve a greater risk of harm to the actor or to others.[88]

All of this, however, is applicable only in jurisdictions with helmet statutes, either in absolute or some limited form.[89] For counsel who find themselves without the benefit of a statute, the preceding discussion is of lesser importance. They, and their counterparts in jurisdictions in which the violation of a statute is only evidence of negligence, will have to base the "helmet defense" on the common-law theory of contributory negligence.

b. *Common-Law Duty*

Generally speaking, a motorcyclist has a duty to exercise the care for

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passenger car to make use of available seat belts, we hold that plaintiff's failure to do so does not constitute negligence per se. Even in jurisdictions in which some form of the seat belt defense has been adopted, the negligence per se approach has been rejected because legislation, which does not require use of the device, "cannot be considered a safety statute in a sense that it is negligence *per se* for an occupant of an automobile to fail to use available seat belts."

Id. at 450-51, 323 N.E.2d at 167-68, *quoting* Bentzler v. Braun, 34 Wis. 2d 362, 385, 149 N.W.2d 626, 639 (1967).

86. *See* PROSSER, *supra* note 56, § 36, at 200-03.

87. *See* section IV(A)(1)(b) *infra.*

88. RESTATEMENT (SECOND) OF TORTS § 288A (1965).

89. *See* notes 39-42 *supra.*

his own safety that a reasonable person would exercise under the same or similar circumstances. Other motorists, in turn, have a right to assume that cyclists will exercise reasonable care for their own safety and will not unnecessarily expose themselves to danger. Therefore, whether *P* in the hypothetical acted unreasonably must be determined by judicial authority and the underlying rationale of the elements that comprise the concept of duty.

The *Rogers* and *Fox* courts disposed of the duty issue with haste and, unfortunately, without sufficient analysis. Each court was unwilling to impose on a motorcyclist a duty to wear a helmet without a mandatory helmet-usage statute in effect at the time the accident occurred.[90] For the most part, the same result has been reached by courts entertaining the "seat belt defense."[91] Counsel should not become discouraged, however, on the basis of these decisions. A sound argument can and should be made concerning the imposition of a duty to wear a helmet on a cyclist such as *P*. Two points support this proposition. First, the *Rogers* and *Fox* courts based their findings entirely on the majority of judicial authority focusing on the "seat belt defense." Although the "helmet defense" in many respects is analogous to the "seat belt defense," the two are definitely distinguishable with regard to the imposition of a duty to wear one safety device as opposed to the other. Second, there is a minority of decisions holding contributory negligence to be a viable theory for asserting the "seat belt defense,"[92] and in a great many of the cases in which a court held otherwise, the rationale has centered on the causation issue rather than the duty issue.[93] These points will be highlighted within the following discussion of the elements of the duty concept.

Dean Prosser offers the following as a framework for determining whether a duty should be imposed on *P* to wear his helmet:

> It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against

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90. *See* notes 51, 61 *supra*.

91. *See* text accompanying notes 82-85 *supra*.

92. In Bentzler v. Braun, 34 Wis. 2d 362, 378, 149 N.W.2d 626, 640 (1967), the Wisconsin Supreme Court said:

> [I]t is obvious that, on the average, persons using seat belts are less likely to sustain injury and, if injured, the injuries are likely to be less serious. On the basis of this experience, and as a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts.

In Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (1969), the court held that a duty to wear a seat belt might arise if, in a particular circumstance, a person would be expected to anticipate the risk of a specific accident. *See also* Mays v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971) (applying Indiana law); Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966).

93. For example, in Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164 (1974), the court found contributory negligence "applicable only if the plaintiff's failure to exercise due care causes, in whole or in part, *the accident*, rather than when it merely exacerbates or enhances the severity of [plaintiff's] injuries . . . ." *Id.* at 450, 323 N.E.2d at 168 (emphasis in original). *See also* Noth v. Scheurer, 285 F. Supp. 81 (E.D.N.Y. 1968); Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (Sup. Ct. 1968).

the value of the interest which the actor is seeking to protect, and the expedience of the course pursued.[94]

In applying this formula, the magnitude of the risk when *P* decides to ride helmetless, the probability or foreseeability of harm, the extent or severity of the harm, and the social value in protecting *P*'s interests must be balanced against the social utility or value of *P* riding helmetless and the burden or expedience of his taking adequate precautions, that is, wearing a helmet.

In analyzing the magnitude of the risk *P* incurs when he decides to ride without a helmet, one must first realize the nature and severity of the potential harm. In this case, the nature of the harm should be obvious since motorcyclists who ride without protective helmets incur a tremendous risk of sustaining fatal or serious head injuries from accidents. Compared to automobile occupants, one who rides a motorcycle incurs an increase in risk of injury or death anyway;[95] but, by not wearing protective headgear this risk is significantly compounded. The National Highway Traffic Safety Administration reports that head injuries are the most frequent single cause of death for both helmeted and unhelmeted cyclists, but the risk of a fatal head injury for unhelmeted cyclists is as much as four times greater than for helmeted cyclists.[96] Therefore, if one were to classify the severity, extent, or gravity of this harm, it would certainly have to be ranked extremely high.

With regard to the element of *P*'s foreseeability, the argument commonly made on behalf of *P* is that although cyclists are generally charged with the duty to foresee reasonable dangers, they have a right to assume that other persons on the highway will not be negligent. Consequently, it is claimed that it is unfair to expect *P* to foresee or anticipate every possible accident and resulting injury. This was precisely the rationale of the *Rogers* court in rejecting defense counsel's assertion of contributory negligence.[97]

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94. PROSSER, *supra* note 56, § 31, at 149.

95. NHTSA claims that because of the extreme vulnerability of motorcyclists their death rate is three times that of auto or truck occupants. USDOT, NHTSA, FACT SHEET: MOTORCYCLE HELMETS—THEY SAVE LIVES AND REDUCE INJURIES. NHTSA explains:

> An automobile has more weight and bulk. It has door beams, bumpers and a roof to provide some measure of protection from impacts or rollover. It has built-in cushioning to soften the impact of a crash and safety belts to hold passengers in their seats. It has more stability because of its four wheels, and, because of its size, is easier to see.

See also VIRGINIA HIGHWAY SAFETY DIVISION & HIGHWAY SAFETY COMMISSION, Nov. 1976 (reports that risk of death to cyclists and accompanying passengers as compared to auto occupants is seven to eight times greater per mile traveled).

96. USDOT, NHTSA, MOTORCYCLE DEATHS RISE AFTER REPEAL OF HELMET USE LAWS (June 29, 1978). *See also* 13 IIHS, THE HIGHWAY LOSS REDUCTION STATUS REPORT No. 8 (June 5, 1978) (cites a Kansas study which found that the death rate for those not wearing a helmet at the time of the accident was three times greater than the rate for those who were wearing a helmet); MICHIGAN DEPARTMENT OF STATE POLICE, OFFICE OF HIGHWAY SAFETY PLANNING, STATEMENT OPPOSING REPEAL OF MICHIGAN'S MOTORCYCLE HELMET LAW (Sept. 1976) (reports that a Nebraska study indicated that head trauma was the cause attributed to 64% of the motorcycle fatalities studied).

97. *See* note 52 *supra*.

There are numerous reasons why this argument is unpersuasive. First, highway accidents or collisions *are* reasonably foreseeable. Highway safety is a national concern in today's era of transportation. We are constantly being subjected to safety campaigns and slogans telling us to "drive with care," "buckle up for safety," and "watch out for the other guy."[98] It may be true, as a matter of mathematical probability, that one will not be involved in an accident when he takes to the highways, but highway accidents are nonetheless common, highly publicized occurrences, and provide citizens with a general awareness of the dangers when traveling. As one legal commentator on the use of seat belts has argued, "the right to assume the due care of others exists only 'in the absence of notice or knowledge to the contrary.' 'Automobile drivers are . . . "on notice" concerning the possibility of an accident and should be held responsible for such notice.' "[99] Reasonable persons in an automobile may not be under a specific duty to anticipate the possibility of an accident with each trip to the grocery store, but those persons are aware of the possibility of accidents and they must exercise ordinary care for their own safety with respect to them. In the case of motorcycles, as the dangers increase with their use, so should a cyclist's awareness of these dangers.

Second, the issue of foreseeability is much broader than simply whether *P* should have reasonably foreseen the *accident*. It also must include the consideration of whether *P* should have reasonably foreseen the *harm* that would come about as a result of a possible accident. As pointed out earlier, helmetless cyclists do, in fact, incur extremely high risks. Surely they must realize that if for some unfortunate reason they were to become involved in a collision and sustain even a minimal amount of impact to their bare heads, a severe head injury or death could be the result.[100] Cyclists choose not to wear helmets not because they foresee no risks involved, but rather, because they enjoy their freedom. Therefore, as with the hypothetical, it is more appropriate to say that *P* chose to ignore the risks rather than to heed their possibility.

Third, as Dean Prosser notes, part of the duty analysis includes the consideration that "[a]s the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less."[101] Prosser explains further that:

If the risk is an appreciable one, and the possible consequences are serious,

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98. *See* Hoglund & Parsons, *supra* note 82, at 13.

99. Recent Developments, 3 HOFSTRA L. REV. 883, 893 (1975), *citing* Roberts v. Bohn, 26 Ohio App. 2d 50, 269 N.E.2d 53 (1971) *and* Comment, *Self Protective Safety Devices: An Economic Analysis*, 40 U. CHI. L. REV. 421, 439 (1973).

100. Dr. Hugh H. Hurt, Jr., the principal investigator for the California research group conducting a study on head impact and injury to a motorcyclist, drew the gruesome analogy that "[a] helmetless head on pavement is like a watermelon." Interview with Mr. Herbert Knox, Legislative and Regulatory Affairs, Nationwide Insurance Co., in Columbus, Ohio (Oct. 27, 1978) (from notes in his file).

101. PROSSER, *supra* note 56, § 31, at 147.

> the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train.[102]

It might be argued by *P* that under the particular circumstances—a Sunday afternoon, nice weather, and his riding only around the community—a reasonable person would not have worn a helmet. Such an argument, in essence, asserts that the scope of foreseeability and the magnitude of *P*'s risk decreases when *P* rides around his community as opposed to his riding on an interstate highway. The difficulty with this argument, however, is that, as in the hypothetical, brain damage or instant death can occur from any accident, regardless of speed, and from only a minimal amount of impact to one's head. Moreover, during the "buckle up for safety" seat belt campaign, the public was inundated with national statistics concerning the frequency of accidents within a short distance of one's residence. At the very least, if reasonable minds can differ on this, then the trier of fact is entitled to make the determination.

One final point with respect to the imposition of a duty on *P* is the interest of society in *P*'s well-being. A United States District Court, which addressed the constitutionality of Massachussetts' helmet statute, aptly stated the economic impact of a helmetless cyclist on society:

> [W]e cannot agree that the consequences of the injuries of a helmetless cyclist are limited to the individual who sustains the injury. . . . From the moment of the injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits plaintiff to think that only he himself is concerned.[103]

Under Prosser's formulation, these considerations must be balanced against the social utility of *P*'s conduct of riding a motorcycle without a helmet. The strongest argument *P* can make is that the interest he seeks to protect is the constitutional "freedom of choice" discussed earlier. Such an argument may have impact, as indeed it has upon state legislators, when competing against the implementation of federal restraints; the argument loses substance, however, the moment it leaves the sphere of governmental restraints and enters into the arena of civil liability. The removal of federal and state mandates on *P* does not also remove his duty to protect himself through reasonable means when a reasonable person would do so. One's freedom of choice is an honorable American tenet, but when one exercises this right in a manner other than that of a reasonable person one will be required to accept consequences of his actions.

Finally, the burden being placed on *P* in taking the necessary

102. *Id.*

103. Simon v. Sargent, 346 F. Supp. 277, 279 (D. Mass. 1972), *aff'd mem.*, 409 U.S. 1020 (1972).

precautions to avoid his injury is very minimal. He is only being asked to wear a helmet, which takes little time and effort, is not inconvenient, imposes insignificant costs, and presents no additional hazard.[104]

It should be noted that most of the helmet-use statistics available indicate that in the states that have repealed their helmet laws, a substantial majority of cyclists still wear their helmets.[105] This differs drastically from the seat belt-use statistics, which indicate that as few as one-third of the motoring public wear seat belts.[106] Undoubtedly, this discrepancy is partially due to the motorcycling public's general awareness of the possibility of highway accidents, the severe consequences that can result from them, and the recognition of motorcycle helmets as a proven safety device in reducing the risk of serious injury and death. If *P*, through laziness, neglect, or sheer refusal, decides not to wear his helmet, *D* and society in general cannot be asked to "cover" for his autonomous and incorrect decision.

It becomes clear, in reviewing the respective weights of the interests asserted in this context, that the scales of justice are tipped in favor of imposing a duty on the plaintiff-cyclist to wear a helmet for his own protection. However, the imposition of this duty in a civil context will undoubtedly incite cyclists and their counsel to renew the objections made earlier in the state legislatures.

It will likely be argued, in response to defense counsel's arguments concerning the existence of a duty, that the repeal of the statute imposing criminal penalties for failure to wear a helmet represents the considered judgment of the legislature that cyclists ought not be expected, or required, to wear a helmet while riding. That decision, it will be argued, is a matter of policy and should not be second-guessed by the courts.

It is up to defense counsel to clarify the issues for the court. It should be emphasized that the death of helmet laws was attributable to the legislative acceptance of the "freedom of choice" arguments of the statute's opponents[107]—arguments which are properly considered in the above described balancing test.[108] It is more appropriate, it should be argued, to consider the repeal as a removal of coercive criminal penalties that had

104. *See* note 25 *supra.*

105. *See* text accompanying note 45 *supra.*

106. *See* Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977), in which the court stated: "[W]hile not controlling as to the standard of conduct, it is a fact and persuasive that the majority of motorists do not habitually use their seat belts. Studies show that as many as two-thirds of observed drivers did not use seat belts." *Id.* at 133, 570 P.2d at 143. *See also* Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288, 289 ("The social utility of wearing a seat belt must be established in the mind of the public before failure to use a seat belt can be held to be negligence.")

107. Those familiar with the repeal of Ohio's helmet statute readily admit that the "freedom of choice" issue was the primary impetus for the repeal. Interview with Mr. George Jupinko, legal counsel, Ohio Department of Highway Safety, in Columbus, Ohio (Oct. 2, 1978); interview with Mr. Herbert Knox, *supra* note 100. In addition, probably the most active opponent of the helmet statutes was the American Motorcycle Association (AMA), which, while strongly asserting the "right to choose," continued to counsel its members to wear protective helmets. *See* note 34 *supra.*

108. *See* text accompanying notes 103-04 *supra.*

previously been imposed on persons now recognized to be of sufficient age and wisdom to take care of themselves.[109] It should be noted that most states that have repealed their helmet statutes have retained the requirements for minors or novices.[110] Viewed in this light, the removal of the *statutory* standard of conduct expected of a motorcyclist does not lead to the removal of the common-law standard of conduct to which a reasonable motorcyclist will be held.[111] This is perhaps best illustrated by the 1977 amendments to the Minnesota helmet statute.[112]

One final note with respect to the repeal movement—it is possible that not only has its pace been slowed, it appears to be backpedaling in some quarters. On the national level, national highway officials are lobbying Congress to allow re-imposition of the federal mandates.[113] On the state level, some legislatures that fell prey to the "freedom of choice" arguments are beginning to wonder whether perhaps that freedom has come at too great a cost.[114]

2. *The Problem of Causation*

Once defense counsel successfully establishes that *P* had a duty to wear a helmet at the time of the accident, and that *P* breached that duty, a causal relationship between that breach and *P*'s injuries must be established. This will present counsel with both practical and theoretical hurdles that must be cleared in his effort to establish the "helmet defense" under the contributory negligence theory—regardless of whether the duty is established under the per se rules or the common law.

From a theoretical standpoint, *Holland* illustrates the difficulty counsel faces in attempting to satisfy the causation requirement. Even if counsel can demonstrate that *P*'s failure to wear a helmet caused all or a portion of the claimed *injuries*, the court might dismiss the argument since *P*'s breach was not the cause of the *accident*. From a practical standpoint, counsel will never reach the theoretical hurdle if he is unable to separate those injuries *P* suffered as a result of the accident, or initial collision, from those sustained as a result of his failing to wear protective headgear. An

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109. In fact, in Ohio a bill was considered, though never introduced, that was quite similar to Minnesota's statutory "helmet defense." Notes in file of Rep. Terry Tranter of Ohio; interview with Mr. Herbert Knox, *supra* note 100.

110. *See* notes 39-43 *supra*.

111. Note that it is well settled that compliance with a statute is not conclusive evidence of a proper exercise of care. RESTATEMENT (SECOND) OF TORTS § 288C (1965) ("Compliance with a legislative enactment . . . does not prevent a finding of negligence where a reasonable man would take additional precautions.").

112. *See* note 68 *supra*.

113. Interview with Georgia Jupinko, *supra* note 78.

114. For example, on Feb. 14, 1979, Rep. Frank Mahnic introduced H.B. 244 in the Ohio General Assembly. The bill, which apparently died in committee, would have re-imposed the helmet-use requirements on all cyclists in the state. Interview with Diane Kuhlman, Research Associate, Ohio Legislative Service Commission, in Columbus, Ohio (April 20, 1979).

additional requirement, of course, is that counsel be able to prove that relationship.

a. *Practical Underpinnings in Asserting a Causal Relationship*

If defense counsel plans to assert the "motorcycle helmet defense," a causal relationship between the plaintiff's nonuse of a helmet and all or a portion of his subsequent injuries must be pleaded and proved. The *Holland* court noted this in stating that a jury would not be entitled to apportion damages "unless expert or other testimony were presented from which it can properly infer that some or all of . . . [plaintiff's] injuries . . . would not have occurred had the helmet been worn."[115] The "seat belt defense" cases also support the proposition that without sufficient evidence allowing a jury to infer the existence of a causal relationship, the court will rule in favor of the plaintiff.[116] As one legal commentator addressing the "seat belt defense" succinctly stated: "It is crystal clear, that competent and convincing evidence of a causal connection between nonuse and the injuries and damages sustained is imperative: The life blood of a legal theory is facts and if there are no facts supporting the theory, it is error to instruct on that theory."[117] Consequently, counsel must gather sufficient evidence to establish the amount of injuries that came to the plaintiff as a result of his failing to wear a helmet.[118] Again, a case similar to the hypothetical would pose no real problems, but in close cases it does not automatically follow that simply because plaintiff fails to wear a helmet, his total injuries are capable of separation and defendant will thus be able to assert the "helmet defense" with success. Also, it does not automatically follow from the separability of the injuries that a court will accept counsel's causation arguments.

b. *Theoretical Considerations—The Accident/Injury Causation Distinction*

Even if defense counsel is successful in imposing a duty on *P* to wear a protective helmet, and is successful in separating *P*'s injuries, the asserted "helmet defense" may run aground due to the traditional effect of the doctrine of contributory negligence and to the particular causation problems inherent in the factual circumstances of a helmet case.

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115. Dean v. Holland, 76 Misc. 2d 517, 518, 350 N.Y.S.2d 859, 861-62 (1973).

116. *See, e.g.*, Bentzler v. Braun, 34 Wis. 2d 362, 379, 149 N.W.2d 626, 641 (1976):

> The record supports the trial court's determination that there was no proof whatsoever to show that [plaintiff's] injuries were caused or aggravated by the failure to use the seat belts. In the absence of credible evidence by one qualified to express the opinion of how the use or nonuse of seat belts would have affected the particular injuries, it is improper for the court to permit the jury to speculate on the effect that seat belts would have had.

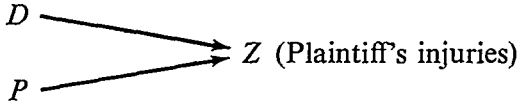
For an excellent article concerning the prerequisite of a causal connection for the seat belt defense, *see* Fisher, *The Medical and Legal Problems Arising from the Failure to Wear Seat Belts*, 27 UNIV. MIAMI L. REV. 130, 146 (1972). *See also* Bowman, *Practical Defense Problems—The Trial Lawyer's View*, 53 MARQ. L. REV. 191 (1970); Annot., 80 A.L.R.3d 1033, 1050 (1977).

117. Kircher, *supra* note 53, at 190.

118. *See, e.g.*, note 50 *supra*.

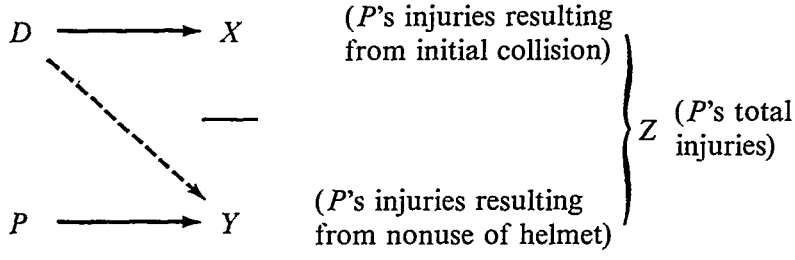
Dean Prosser notes that even after a court determines that a statutory violation is negligence per se, "[t]here will still remain open such questions as the causal relation between the violation and the harm to the plaintiff. . . ."[119] A literal reading of Dean Prosser's point would seemingly raise no problem since a causal relationship does exist between the nonuse of a helmet and the resulting *harm* to the plaintiff. However, because of the accident/injury causation problem, a court might reason that regardless of the *harm* resulting from plaintiff's conduct, that conduct was not the cause of the initial *accident.* Consequently, it is critical for counsel to anticipate such a possibility and recognize that the court may, on that basis, discard the contributory negligence assertion entirely, rather than recognize its applicability to the reduction of plaintiff's damages. To illustrate, the reader is asked at this time to recall the facts of the earlier posited hypothetical, and to focus on the following examples.

In a typical contributory negligence situation, the plaintiff (*P*) and the defendant (*D*) both create the harmful situation and bring about *P*'s injuries. For example, if *P* as a pedestrian carelessly walks out into moving traffic and is subsequently struck by a careless motorist, *D*, the causation may be illustrated by the following diagram:



It can be said in this instance that both *P* and *D* caused (indicated by solid arrows) the accident and *P*'s injuries in the amount of *Z*. In the jurisdictions that recognize contributory negligence, as opposed to comparative negligence,[120] the operational effect of the doctrine of contributory negligence usually acts as a complete defense for a defendant, totally barring a plaintiff's claim for recovery. The "all-or-nothing" effect of the doctrine may be a just result in this instance since *P*'s negligence brought about both the accident and injuries to him.

In a "helmet defense" case, however, the factual circumstances are distinguishable and give rise to more difficult causation problems. For example, *P* and *D*'s conduct in the hypothetical may be illustrated by the following:



119. PROSSER, *supra* note 56, § 36, at 200-01. This language is contained in the discussion of *negligence* per se, but Prosser later notes that the "accepted rule" concerning a statutory violation by a plaintiff "is to stand on the same footing as a violation by the defendant." *Id.* at 203.

120. *See* text accompanying notes 151-55 *infra.*

In this instance, it can be said that *D* solely caused (indicated by solid arrow) *X* amount of *P*'s total injuries, *Z*, as a result of causing the accident and colliding with *P* in the first place. Also, based on the traditional "thin skull rule"[121] of negligence theory, whereby a defendant takes his plaintiff as he finds him, *D* can be said to have caused (indicated by dotted arrow) *Y* amount of *P*'s total injuries. Notwithstanding this traditional notion, however, the fact remains that *Y* amount of *P*'s total injuries was also caused (indicated by solid arrow) by *P* himself in failing to wear a protective helmet. Thus, the factual circumstances create an accident/injury causation distinction.[122] It is this distinction that will plague counsel for the remainder of the trial, and he must be careful to keep the court informed on the intricacies of the theory and its basis in fairness and reason.

One question that must be confronted early in the case is whether to attempt to secure a total bar to *P*'s claim or merely reduce his recovery. Because of the "all-or-nothing" effect of contributory negligence, counsel might meet with resistance from the court to the doctrine's application in this context, especially when *D* does not deny causing the *accident*.[123] While a total bar should not be discounted without consideration it is clear that arguments for a total bar to recovery in these cases are not for the meek. First, not only is the "helmet defense" without any legal authority justifying a total bar, such authority is lacking in the "seat belt" cases as well.[124]

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121. PROSSER, *supra* note 56, § 43, at 260-63. One court relied on the "thin skull rule" in rejecting a "seat belt defense," stating: "[O]nce the element of injury proximately caused by the defendant's negligence is introduced, it is traditional that the defendant take the plaintiff as he finds him . . . ." Lipsomb v. Diamiani, 226 A.2d 914, 918 (Del. Super. Ct. 1967). *See also* Fischer v. Moore, 183 Colo. 392, 393, 517 P.2d 458, 459 (1974); Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613, 616 (1967).

122. This distinction was also recognized in Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (Super. Ct. 1969), a seat belt case in which plaintiff was a passenger in an automobile driven by defendant Arndt that collided with a second defendant motorist. Answering plaintiff's complaint for personal injuries, the second defendant asserted a "seat belt defense." The court, on plaintiff's demurrer, stated:

> It is . . . obvious that the defendant cannot claim that the plaintiff was contributorily negligent in the sense that his conduct was a contributing cause of the collision between the Arndt vehicle and the defendant's vehicle. The defendant's claim is, rather, that the plaintiff's conduct caused the plaintiff to sustain injuries which he would not have sustained if he had fastened his seat belt. The distinction between these two phases of a plaintiff's alleged negligence has been long recognized in this state.

Id. at 291, 259 A.2d at 145-46. The court continued, quoting from another Connecticut case:

> To . . . [defeat the action] it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though, of course, it may affect the amount of damages recovered in a given case.

Id. at 291, 259 A.2d at 146 (brackets in original), *quoting* Smithwick v. Hall & Upsom Co., 59 Conn. 261, 271, 21 A. 924, 925 (1890).

123. The court's reluctance may be cured (if a total bar is not being sought, *see* notes 125-27 and accompanying text *infra*), by citing it to the damage apportionment rules, discussed at notes 137-50 and accompanying text *infra*.

124. At least one commentator has cited General Motors Corp. v. Walden, 406 F.2d 606 (10th Cir. 1969), as authority for a total bar. Kircher, *supra* note 53, at 177. That proposition is arguable at best. The court affirmed a lower court's instructions to the jury stating that if the decedent was found negligent in not using his seat belt *and* in driving while under the influence of alcohol *and* that such negligence was the proximate cause of the accident and death that they must find against the plaintiff.

A total bar should, nonetheless, be sought in appropriate circumstances. For example, although nearly inconceivable, a motorcyclist's failure to wear a helmet might be a contributing cause of an *accident* or *initial collision.*[125] This would effectively turn the factual circumstances into an ordinary contributory negligence situation, illustrated by the first diagram, thereby destroying the accident/injury distinction.

More importantly, it is possible that an accident between a motorist and a motorcyclist could occur in a manner similar to the hypothetical. Thus, the initial impact between *P* and *D* would have left *P* relatively unharmed if *P* had been wearing a helmet; however, because he did not, *all* of his injuries came as a result of the "second collision."[126] Therefore, even if the bar initially sought by defense counsel is partial in form, it might turn out to be total in substance. Such a factual occurrence is possible given that a minimal impact to one's head can account for substantial injuries. Nonetheless, it remains highly improbable that no injuries would come about from an initial collision between an automobile and a motorcycle.

Finally, defense counsel may be in a jurisdiction that strictly applies the contributory negligence doctrine in all situations. In other words, it may be possible that once a court allows the "helmet defense" to be asserted under the contributory negligence theory, it may strictly adhere to its operative effect as a complete defense and ignore the accident/injury causation distinction. A rationale for this is couched in the commonly cited definition of contributory negligence, which literally reads that the plaintiff's failure to use ordinary care to protect himself is causally connected to the *harm* or *injury* sustained rather than to the *accident.*[127]

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125. The court in State v. Craig, 19 Ohio App. 2d 29, 249 N.E.2d 75 (1969), saw this as a constitutional justification for the enactment of helmet laws. *See* note 28 *supra.*

126. "Second collision" cases, by illustration, involve two motor vehicles initially colliding and subsequently causing a "second collision" between the occupant of one vehicle and the inside of the vehicle itself. Several "second collision" cases have also recognized an accident/injury distinction. For example, in Bolm v. Triumph Corporation, 33 N.Y.2d 151, 305 N.E.2d 769 (1973), a plaintiff-motorcyclist brought a products liability suit against the defendant-manufacturer of the motorcycle. Plaintiff claimed that the motorcycle was defectively designed by the placement of a parcel grid on the motorcycle directly in front of the rider. Plaintiff was in a collision with another motorist and he claimed that although the defective design did not cause the accident, it aggravated and contributed to his injuries. The trial court granted defendant's motion for summary judgment on the basis of the traditional second collision rule which refuses to extend liability to the manufacturer when the defective design did not cause the accident. The appellate division reversed and the court of appeals affirmed. The defendant was permitted to separate those damages caused by the initial impact from those of the second collision between the plaintiff and his motor vehicle, thus illustrating the court's willingness to extend liability to the manufacturer for those injuries caused by the defective design but not for the entire amount when such a defective design had no causal relationship to the happening of the accident.

Cf. Note, *Seat Belt Negligence in Automobile Accidents,* 1967 WIS. L. REV. 288, 298: "The easy case [of whether the non-use of seat belts produced the injuries] . . . is where the plaintiff's head moves forward and strikes the windshield during the accident, with little or no damage to the car or to other parts of the plaintiff's body."

Courts have not referred to a helmet case as a form of a "second collision" case; however, not only is the situation analogous but counsel might draw upon the "second collision" label to strengthen the argument that a court entertaining a helmet case should at least follow the causation reasoning in "second collision" cases and thus allow a partial bar with the helmet defense as opposed to disallowing the defense at all.

127. *See* Prosser, *supra* note 56, § 65, at 416-17; RESTATEMENT (SECOND) OF TORTS § 463 (1965),

It is suggested that defense counsel keep the possibility of a total bar in mind, but in order to increase the chances for successfully asserting the "motorcycle helmet defense" it is critical for counsel to recognize the need to plead alternatively in such a fashion as to assert a partial bar to a plaintiff's personal injury claims. As *Holland* indicates, counsel can and should use the accident/injury distinction to his advantage. It is clear that the *Holland* court was troubled by the accident/injury causation problem; in fact, although it is not clear from the opinion, this concern apparently led the court to dismiss the contributory negligence theory entirely, refusing to bar totally the plaintiff's recovery.[128] The court was willing, however, to allow the "helmet defense" under some other mitigation theory. The jury was to be allowed to impose a partial bar, apportioning the damages between the parties based on a determination of the *Y* amount of the plaintiff's total injuries, *Z*, caused by his negligent failure to wear a helmet.[129]

Because the *Holland* court's analysis in resolving the accident/injury causation problem was scant, and without going beyond the scope of this article by handling the complexities of the causation requirements of the negligence doctrine, a few points merit discussion for defense counsel.

The causation analysis of any negligence claim is generally thought to operate in two phases: actual causation, or causation in fact, and proximate causation. With regard to the actual causation analysis, Dean Prosser alludes to the "but for" test[130] in determining whether one's negligent conduct was the actual cause of the harm. Framed in terms of the hypothetical and from defense counsel's standpoint, it might be said that *P* would not have sustained *Y* amount of his total injuries, *Z*, *but for* the fact he did not wear his protective helmet. The Restatement (Second) of Torts incorporates a broader test, commonly referred to as the "substantial factor" test,[131] which would find negligent conduct as the legal cause of the harm if it was a substantial factor in bringing it about.

Consequently, assuming counsel can substantiate the causal relationship between *P*'s helmetless conduct and his subsequent injuries, the first phase of the causation requirement can be satisfied. As depicted earlier,[132] counsel can simply explain the mechanics of who actually caused what. The argument might be as follows: Although *D*, through the negligent operation of his automobile, actually caused the initial *accident*, it was *P* who actually caused all or a substantial portion of the *injuries* through his negligence in riding without a protective helmet. Framed in

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reproduced in pertinent part in note 74 *infra*. *See also* text accompanying notes 132-36 *infra*, discussing the problem of causation.

128. *See* text accompanying note 64 *supra*.

129. *See* text accompanying note 65 *supra*.

130. PROSSER, *supra* note 56, at 238-39.

131. RESTATEMENT (SECOND) OF TORTS § 432 (1965).

132. *See* text accompanying notes 120-21 *supra*.

these terms, it is easier for a court to comprehend the accident/injury distinction as an appropriate basis for applying the "helmet defense" as a partial bar.

The second phase of the causation requirement, concerning proximate causation, can also be met by defense counsel. The proximate cause analysis has been a legal can of worms for courts and practicing attorneys. Dean Prosser states that it involves "merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct."[133] In addition, the analysis involves the troublesome issue of "intervening factors" and whether a particular intervening factor constitutes a "superseding cause" so as to preclude the liability of the actor.[134] In this situation, due to the accident/injury distinction, the analysis might proceed along two lines.

First, from the standpoint of *D*, counsel might argue that *P*'s helmetless conduct constitutes an intervening factor and a superseding cause of the resulting consequences, which *D* could not be expected to foresee. Thus, it effectively cuts off *D*'s original responsibility for causing that portion of *P*'s harm caused by *P*'s failing to wear a helmet. Dean Prosser discusses the issue as being "one of whether the defendant is to be held liable for injury to which he has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which he is not responsible."[135]

Second, from *P*'s standpoint, counsel should recall the earlier discussion concerning the imposition of a duty on *P* to wear a helmet in the first place. Counsel might argue that because it is reasonably foreseeable by *P* that harm would come to him as a result of his being helmetless and becoming involved in an accident, such conduct by *P* can be said to be the proximate cause of his harm or injuries. In other words, the negligence of *D* in causing the collision is not a superseding cause of *P*'s contributory negligence in causing the harm, because a reasonable cyclist would easily foresee that a negligent driver might collide with him and that the absence of a helmet would cause or aggravate the injuries.

Counsel should note that although it is not clear that the *Holland* court proceeded in such a deliberate two phase analysis in order to reconcile the accident/injury causation problem, the court did use proximate cause language in reaching its finding.[136] Consequently, it is

133. PROSSER, *supra* note 56, § 41, at 236.

134. RESTATEMENT (SECOND) OF TORTS § 441 (1965) defines an intervening force as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Under the Restatement, if an intervening cause is determined to be a superseding cause (this determination established according to the rules in §§ 442-453), it relieves the defendant from liability "irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm." *Id.* § 440, comment b. Section 440 defines a superseding cause as an "act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing it about."

135. PROSSER, *supra* note 56, § 44, at 270.

136. *See* notes 64, 65 and accompanying text *supra*. *See also* Street v. Cavert, 541 S.W.2d 576

suggested that regardless of the complexities of the causation requirements, counsel's use of the deliberate two phase analysis outlined above should facilitate a court's seeing that as a matter of fairness and equity, a jury should be entitled to apportion the damages between *P* and *D* based on their finding the amount of damages each caused. Therefore, *D* would be required to recompense *P* for the amount of injuries *D* caused by initially colliding with *P*, and not compensate him for those injuries *P* caused himself as a result of his negligent conduct.

3. *Applying the Damage Apportionment Rules*

Counsel's success in asserting the "helmet defense" under the contributory negligence theories, and seeking a partial bar to plaintiff's recovery, may be contingent upon his ability to persuade the court to apply the damage apportionment rules set forth in the Restatement (Second) of Torts.[137] Otherwise, as previously mentioned, a court's grappling with the accident/injury causation problem, inherent in helmet cases, and the operative effect of the "all-or-nothing" rule, may lead to a dismissal of the "helmet defense" under the contributory negligence theories rather than the application of the damages apportionment rules so as to reduce the plaintiff-cyclist's recovery.[138]

This matter might quickly be resolved if counsel is within a state having an apportionment statute or its common-law equivalent in effect. But in the absence of either, counsel should argue in accordance with the Restatement (Second) of Torts sections concerning apportionment.

First, section 433A provides that

> [d]amages for harm are to be apportioned among two or more causes where (a) there are distinct harms. . . .[139]

(Tenn. 1976), in which the Supreme Court of Tennessee allowed the "seat belt defense" to be asserted under the doctrine of "remote contributory negligence." The court defined that term as "that negligence which is too far removed as to the time or place, or causative force, to be a direct or proximate cause of the accident." *Id.* at 585. The court then suggested an appropriate jury charge: "If you find the plaintiff guilty of such remote contributory negligence, you must reduce the recovery which you would otherwise award, in proportion to plaintiff's contribution to the injury." *Id.*

137. RESTATEMENT (SECOND) OF TORTS § 433A (1965). *See* text accompanying notes 139-44 *infra*.

138. *See* Hoglund & Parsons, *supra* note 82, at 10:

> Both the contributory negligence and avoidable consequences doctrines are judicially created. Yet many courts, engaging in classic examples of "pigeonhole jurisprudence," have declined to fill the void left by the two concepts by inferring a duty to avoid the consequences of an accident *before* its occurrence. . . .
>
> . . .[T]he tacit recognition of the inequities involved in the rejection of [these two doctrines] has led many jurisdictions to adopt a damage apportionment technique. Apportionment of damages is, in effect, the judicial merger of the doctrines of contributory negligence and avoidable consequences whereby evidence of [nonusage] . . . may be considered to diminish a damage recovery.

The authors then indicate that there is a growing number of jurisdictions allowing "diminution of damages because of a party's failure to fasten [a] . . . seat belt . . . ." *Id.* at 10 n.33. *See, e.g.*, Mays v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971) (applying Indiana law); Glover v. Daniels, 310 F. Supp. 750 (N.D. Miss. 1970); Noth v. Scheurer, 285 F. Supp. 81 (E.D.N.Y. 1968); Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969); Uresky v. Fedora, 27 Conn. Supp. 498, 245 A.2d 393 (1968); Josel v. Rossi, 7 Ill. App. 3d 1091, 288 N.E.2d 677 (1972).

139. RESTATEMENT (SECOND) OF TORTS § 433A (1965).

Comment a to this section further elaborates that

> [t]he rules [in 433A] apply whenever two or more causes have combined to bring about harm to the plaintiff, and each has been a substantial factor[140] in producing the harm.[141]

Then, comment f, entitled "contributory negligence," states that

> apportionment may be made between the plaintiff and the defendant when the plaintiff himself is at fault.[142]

Finally, comment c to section 465[143] provides that

> [s]uch apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues.[144]

These rules should equip counsel with some strong ammunition for successfully establishing the "helmet defense" under the contributory negligence theories in order to achieve a partial bar to plaintiff's claim. A court must be made aware of the fact that such an application of the damage apportionment rules would lead to a more fair and equitable result. It should be argued that *P* would still be entitled to the portion of damages *D* actually caused by initially colliding with *P*. Moreover, *D* still has the difficult burden of proving what, if any, percentage of the damages occurred as a result of *P*'s failing to wear his protective helmet.[145] If, in the

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140. The "substantial factor" test is stated in Restatement §§ 431 and 433. Under § 431 one's negligence is a "legal cause" of the harm "if his conduct is a substantial factor in bringing about the harm. . . ." Section 433 discusses the factors in determining the element of substantiality.

141. RESTATEMENT (SECOND) OF TORTS § 433A, comment a (1965).

142. RESTATEMENT (SECOND) OF TORTS § 433A, comment f (1965). This is illustrated as follows:

> Through the negligence of *A*, *B*, and *C*, water escapes from irrigation ditches on their land, and floods a part of *C*'s farm. There is evidence that 50 per cent of the water came from *A*'s ditch, 30 per cent from *B*'s ditch, and 20 per cent from *C*'s. On the basis of this evidence, *A* may be held liable for 50 per cent of the damages to *C*'s farm,and *B* liable for 30 per cent.

RESTATEMENT (SECOND) OF TORTS § 433A, Illustration 9 (1965).

143. Causal Relation Between Harm and Plaintiff's Negligence

> (1) The plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it.
>
> (2) The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others.

RESTATEMENT (SECOND) OF TORTS § 465 (1965).

144. RESTATEMENT (SECOND) OF TORTS § 465, comment c (1965), *citing, inter alia*, Hamilton v. Boyd, 218 Iowa 885, 256 N.W. 290, (1934); Wright v. Ill.-Miss. Tel. Co., 20 Iowa 195 (1866); O'Keefe v. Kansas City W. R. Co., 87 Kan. 322, 124 P. 416 (1912); Guile v. Greenberg, 192 Minn. 548, 257 N.W. 649 (1934); Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 705 (1878).

145. *D*'s burden of production might be governed by RESTATEMENT (SECOND) OF TORTS § 433B (1965), which provides in part:

> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment among them is upon each such actor.

The comments indicate that "Subsection (2) states an exception to the general rule stated in Subsection (1). It arises where the tortious conduct of two or more actors combines to bring about harm to the

eyes of the jury, *D*'s evidence does not preponderate on this issue, *P* prevails.

Many courts and commentators have objected to a jury's apportioning the damages either because it allows for widespread jury speculation,[146] or because it is too akin to comparative negligence.[147] In the seat belt case of *Spier v. Barker*,[148] the New York Court of Appeals explained why the speculation claim was unjustified:

> In addition to underestimating the abilities of those trained in the field of accident reconstruction, this argument fails to consider other instances in which the jury is permitted to apportion damages (i.e., as between an original tort-feasor and a physician who negligently treats the original injury). Furthermore, if the defendant is unable to show that the seat belt would have prevented some of the plaintiff's injuries, then the trial court ought not submit the issue to the jury.[149]

And, as one legal commentator has asserted with regard to apportioning damages in "seat belt defense" cases: "Although the cry of 'speculation' may be well founded in some cases, 'even an unsophisticated apportionment would in all likelihood, be superior to the . . . flat rule allowing' or denying full recovery."[150]

4. *Comparative Negligence Jurisdictions*

Up to this point, this article has been for the benefit of defense counsel in jurisdictions adhering to the doctrine of contributory negligence, rather than comparative negligence. Because the number of comparative negligence jurisdictions is growing,[151] however, and because the "helmet

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plaintiff, and the harm which results is capable of apportionment among the causes producing it, as stated in § 433A (1), and the Comments to that Section." RESTATEMENT (SECOND) OF TORTS § 433B, comment c (1965).

146. In Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970), the court said that "the complicated task of damage apportionment would 'invite verdicts in prejudice and sympathy contrary to the law,' create 'unnecessary conflicts in result,' and 'degrade the law by reducing it to a game of chance.'" *Id.* at 239, 262 A.2d at 553, *quoting* Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. Super. Ct. 1967).

147. There is, however, an important distinction between the two doctrines. *See* text accompanying note 154 *infra*.

148. 35 N.Y.2d 444, 323 N.E.2d 164 (1974).

149. *Id.* at 452-53, 323 N.E.2d at 169. *See also* Vizzini v. Ford Motor Co., 569 F.2d 754, 771 (3d Cir. 1977) (Weis, J., concurring and dissenting):

> I am not persuaded by the objection that acceptance of seat belt testimony by a jury will require speculation on the proper amount of damages. It is naive indeed to say that the law does not permit juries to speculate on damages when daily they are asked to determine the value of future pain and suffering. There are few things more uncertain in this world than the length of a particular person's life, yet juries regularly determine damages in death cases. Indeed, in this very case that problem was submitted to the jury. Damage apportionment in a seat belt case would not be more conjectural.
>
> The jury should have been permitted to consider the evidence of seat belts as bearing on mitigation of damages. I would place the burden on the defendant to prove the elements of mitigation but would not bar the jury from considering this valuable evidence.

150. Recent Developments, 3 HOFSTRA L. R. 883, 887 (1975), *quoting* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 476 (1953).

151. Thirty-two states have replaced contributory negligence with some form of comparative negligence. The following traces the growth:

defense" is still applicable in such jurisdictions, a few issues merit brief discussion.

With regard to the "seat belt defense" it has been suggested[152] that the application of comparative negligence rules obviates the need for counsel to assert the "defense;"[153] and, at first glance, this appears to be the case since comparative negligence operates to trigger automatically the apportioning of damages between the parties. There is a subtle and important distinction, however, between damage apportioning under comparative negligence and damage apportioning under a partial bar theory of the "seat belt" or "helmet defense." Under the rules of comparative negligence, a jury apportions the damages based on the *fault* of each party, while under the "seat belt" or "helmet defense" and the accompanying damage apportion rules, the damages are apportioned

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1950—Ga.; Miss.; Neb.; S.D.; Wisc.
1957—Arkansas
1965—Maine
1969—Hawaii; Mass.; Minn.; N.H.
1970—Vermont
1971—Colo.; Idaho; Oregon; R.I.
1973—Conn.; Nevada; N.J.; N.D.; Okla.; Tex.; Utah; Wash.; Wyo.; Fla. (by the S. Ct.)
1974—Kansas
1975—Mont.; N.Y.; Pa.; Calif. (S. Ct.); Alaska (S. Ct.)

V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

There are a variety of comparative negligence systems. For instance, in the "pure" comparative negligence jurisdictions, the negligence of plaintiff and defendant are compared and the damages are apportioned accordingly. There are some jurisdictions where a plaintiff's negligence must be less than the defendant's in order for the plaintiff to recover, and other jurisdictions where the plaintiff will recover if his negligence is not greater than the defendant's. Finally, there are a few jurisdictions where a plaintiff will recover only if his negligence is slight compared to the gross negligence of the defendant. PROSSER, *supra* note 56, § 67, at 436-37.

152. The same suggestions might also be made with regard to the "helmet defense," even though such a suggestion was not made in the helmet cases. When the *Rogers* and *Holland* decisions were handed down, Maryland and New York, respectively, were without comparative negligence. The New York Legislature shortly thereafter enacted comparative negligence while Maryland still adheres to the contributory negligence doctrine. When the *Fox* case was decided, Minnesota did have comparative negligence; however, since the helmet defense was rejected, the court never acknowledged the issue.

153. Spier v. Barker, 42 App. Div. 2d 248, 348 N.Y.S.2d 581 (1974). The appellate division, affirming a trial court's rejection of the "seat belt defense," stated:

> [T]he effect of the charge relating to the doctrine of avoidable consequences would have been error if the issue of liability had been resolved in favor of plaintiff. Under the terms of the charge on this issue, the ensuing damages would have to be apportioned on the basis of how much or to what extent these damages were due to the accident, the impact itself on the one hand, or the failure to use the available seat belt on the other. To permit a jury to apportion damages on this basis would permit the jury to engage in damages under comparative negligence, which doctrine has not yet been accepted in New York.

Id. at 253, 348 N.Y.S. 2d at 583. The New York Court of Appeals later reversed this position, 35 N.Y.2d 444, 323 N.E. 2d 164 (1974). *See also* Recent Developments, 3 HOFSTRA L.R. 883, 884 (1975).

In Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977), the case arose out of a diversity action and products liability suit against the defendant for a defective brake system. Defense counsel had argued for the assertion of the "seat belt defense" under the doctrine of avoidable consequences so as to reduce the plaintiff's recovery. The court affirmed the lower court's rejection of the "seat belt defense" by stating at 765: "We therefore believe that evidence of non-usage cannot be admitted in Pennsylvania under any general theory of comparative negligence." In note 7 to the opinion the court also said: "Pennsylvania's new comparative negligence statute may well obviate the need so to alter (so as to expand its application to pre-accident situations) the traditional avoidable consequences rules in many cases (parentheses added)."

based on what each party *caused*, regardless of the degree each may be at fault.[154]

It may be more appropriate to say, and indeed it has been suggested with regard to the "seat belt defense,"[155] that courts in comparative negligence jurisdictions will be more willing to accept the "helmet defense" since it would pertain to the issue of damage reduction and not to the issue of liability.

B. *The Doctrine of Avoidable Consequences*

A second theory, other than contributory negligence, that has been used rather frequently by defense attorneys in the "seat belt defense" cases

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154. *See* Vizzini v. Ford Motor Co., 569 F.2d 754, 769-70 (3d Cir. 1977) (Weis, J., concurring and dissenting):

> Comparative negligence appraises the factors which caused the impact, collision or similar event and uses the relative degree of fault to reduce the damages. Mitigation or apportionment of damages and avoidable consequences, on the other hand, are directed toward activity (or nonaction) having a direct bearing on the extent of injury but not on the conduct causing the litigated event. . . . The monetary result reached by apportioning damages may be the same as in application of comparative negligence but the factors leading there must be distinguished. By way of illustration it may be helpful to examine the results which could occur in a routine intersection accident case in a state which applies comparative negligence and also apportionment of damages. A jury might well determine that driver A was ten percent at fault for failing to observe driver B going past a stop sign, and also that if driver A had been wearing a seat belt, his damages would have been twenty percent less than those actually sustained. Both factors would then be applied to reduce the amount recoverable. Because the same result can be reached under comparative negligence without concern over whether the plaintiff's conduct goes to liability or damages, there is a tendency to blur the line between them. . . . The concepts of liability and damages are distinct and must be kept so.

See also V. SCHWARTZ, COMPARATIVE NEGLIGENCE 276 (1974):

> The process is *not* allocation of physical causation, which could be scientifically apportioned, but rather of allocating *fault*, which cannot be scientifically measured. For example, suppose an intoxicated motorcyclist speeds at eighty miles an hour down a highway with a 55 mile speed limit. He loses control of his vehicle and crosses over into the opposite lane where he collides with a large truck traveling 65 miles per hour. The point of collision is the left fender of the truck. As a result of the impact, the motorcyclist is killed and his vehicle is a total loss. The truck, however, is only slightly damaged and the truckdriver is not hurt at all. . . . In terms of pure physical causation, perhaps an expert could testify that the truck supplied 95% of the force that killed the motorcyclist, based on formulae combining the relative weights, speeds and directions of the vehicles. Even without expert assistance, the jurors might, by instinct, regard the truck as the more substantial cause. Nevertheless, the jury's line of inquiry under comparative negligence does not focus on physical causation; rather, it considers and weighs culpability.

See also Hoglund & Parsons, *supra* note 82, at 18-25.

155. Kircher, *supra* note 53, at 188. Kircher cited three cases, Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967), Kelley v. United States, Civ. No. 4094 (S.D. Miss. 1967), Yvan v. Farstad, 62 W.W.R. (N.S.) 645 (B.C. 1967), from comparative negligence jurisdictions that "either applied the (seat belt) defense to reduce damages or found that the defense could be applied in a proper case." Kircher, *supra*, at 189. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 97 (1974):

> When a state has a general system of comparative negligence, apportioning damages is much easier in the seat-belt cases because the courts are accustomed to dealing with damage apportionment between negligent plaintiffs and defendants. . . . This is not to say that any state with comparative negligence will automatically adopt the seat-belt defense. The court may believe that the defense should not be allowed because it sets too high a standard of care . . . or that it is impossible to determine precisely how the wearing of a seat belt would have mitigated damages. The point is that if a court thinks reasons of policy sponsor the defense, it can more readily and easily apply it if its state has a general system of comparative negligence.

is the doctrine of avoidable consequences.[156] The doctrine's traditional definition is:

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damages which could thus have been avoided.[157]

The doctrine's underlying rationale is to discourage "persons against whom wrongs have been committed from passively suffering economic loss which could have been averted by reasonable efforts. . . ."[158] Correspondingly, the doctrine operates to preclude the plaintiff from recovering those damages that were reasonably capable of being avoided. Because the doctrine is a rule of damages, it is essentially an application of the damage apportionment rules mentioned above.[159] However, most of the courts and legal commentators considering the avoidable consequences theory refer to it as a separate basis for the "seat belt defense."

Until the recent developments in seat belt cases, the avoidable consequences theory could not be said to be an appropriate basis for the "helmet defense" since inherent in the theory's definition is its traditional application to post-accident situations in which the duty[160] to avoid or mitigate damages arises *after* the wrong has been committed by the tortfeasor. The paradigmatic case is when a tortfeasor injures the plaintiff and after the accident the plaintiff fails to seek medical treatment, thereby increasing or aggravating his injury.[161] A court would apply the doctrine in this situation to preclude the plaintiff from recovering for those injuries he could have reasonably avoided.

The helmet and seat belt cases, however, pose a distinct problem by creating a pre-accident factual situation, inconsistent with the traditional post-accident application of the theory. In other words, a plaintiff-cyclist's

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156. Many courts use the terms "avoidable consequence," "mitigation," "minimization," "diminution," "reduction," and "apportionment of damages" interchangeably.

157. C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 33, at 127 (1935).

158. *Id.*

159. RESTATEMENT (SECOND) OF TORTS § 433A, comment f (1965) provides:

> The damages rule as to avoidable consequences, stated in § 918, which denies recovery for the aggravation of personal injuries or other harm resulting from the plaintiff's failure to use due care to avoid it after the commission of the tort, frequently requires such apportionment, and is merely an application of the rule stated here.

RESTATEMENT OF TORTS § 918(1) (1938) provides: "[A] person injuried by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort." The tentative draft of the Restatement (Second) of Torts states: "[O]ne injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of reasonable effort or expenditure after the commission of the tort." RESTATEMENT (SECOND) OF TORTS § 918(1) (Tent. Draft No. 19, 1973).

160. McCormick suggests that this should not be thought of as a " 'duty' to avoid damages, but rather ". . . a 'disability' to recover for avoidable loss"—a "penalty." McCORMICK, *supra* note 157, § 33, at 128.

161. *E.g.*, Wingrove v. Home Land Co., 120 W. Va. 100, 196 S.E. 563 (1938).

failure to wear a helmet comes *before* the defendant's negligence or the accident. Therefore, the *Rogers* court, and many courts entertaining the "seat belt defense,"[162] have rejected the avoidable consequences theory by reasoning that to place a duty on the plaintiff to wear his helmet before the accident occurs essentially imposes a pre-accident obligation on him and effectively denies his right to assume that others will exercise due care towards him.[163]

Based on the recent seat belt case of *Spier v. Barker*,[164] however, the trend of the courts has been to allow the assertion of the "seat belt defense" under an expanded application of the avoidable consequences theory.[165] In *Spier*, the plaintiff, as a result of colliding with defendant at an intersection, was thrown from her automobile and subsequently pinned by her vehicle when it rolled onto her legs.[166] At the trial court, defense counsel attempted to introduce testimony showing that if plaintiff had worn her seat belt she would not have been ejected from her vehicle, and thus her injuries would not have been as severe.[167] Although the appellate division refused to allow counsel to assert the "seat belt defense" under the avoidable consequences theory,[168] the New York Court of Appeals, on review, found the theory to be an appropriate basis for the "defense."[169] The *Spier* court discussed the theory's traditional application and recognized that "the opportunity to mitigate damages prior to the occurrence of an accident does not ordinarily arise."[170] In rejecting what the court felt was a "chronological distinction" applicable in most cases, it opined that in this case "the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages *prior* to the accident."[171]

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162. *See, e.g.*, Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030, 1035 (1972).

163. *See* note 52 *supra*.

164. 35 N.Y.2d 444, 323 N.E.2d 164 (1974).

165. Courts and legal commentators have referred to application of the avoidable consequences theory as being *expanded*. This might be misleading, since the RESTATEMENT (SECOND) OF TORTS refers to the doctrine merely as an application of the basic damage apportion rule, *see* note 159 *supra*. Therefore, the courts may be implicitly applying this basic damage rule instead of actually *expanding* the traditional avoidable consequences theory.

166. 35 N.Y.2d at 446-47, 323 N.E.2d at 165-66.

167. *Id.* at 447-48, 323 N.E.2d at 166. Defense counsel proffered testimony of a professor of mechanical and aerospace engineering who had extensive experience with the use of seat belts and was willing to express his opinion as to their general effectiveness.

168. Spier v. Barker, 42 App. Div.2d 428, 348 N.Y.S.2d 581 (1974).

169. 35 N.Y.2d at 450-51, 323 N.E.2d at 167. The court said:

> We today hold that non-use of an available seat belt, and expert testimony in regard thereto, is a factor which the jury may consider, in light of all the other facts received in evidence, in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain.

The court refused to accept the other theories to the "seat belt defense."

170. *Id.* at 451-52, 323 N.E.2d at 168.

171. *Id.* (emphasis in original). *See also* Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977), in which the dissenting justice reasoned:

> Simply because the correct pigeon hole for the legal theory is not immediately apparent does

Other courts have adopted the *Spier* court's reasoning in allowing the "seat belt defense" to be asserted under the avoidable consequences theory,[172] and based on this recent development, counsel should have increasing success in establishing the "helmet defense." But to ensure such success and guard against the possibility of a court's refusing to follow *Spier* as a basis for the "helmet defense," counsel should reassert the proposition that the avoidable consequences theory is simply a specific, and not an exclusive, application of the Restatement's apportionment rules.[173] In this manner, a court can be urged to reach the same equitable ends through the more appropriate means discussed earlier.

C. *Assumption of Risk*

Of the possible theories set forth in this article, assumption of risk is probably the weakest for defense counsel seeking to establish the "motorcycle helmet defense." As defined, the assumption of risk theory views a plaintiff's conduct as voluntarily encountering the known risk or harm resulting from a defendant's negligence.[174] Consequently, the plaintiff should be barred from recovering for the injuries sustained while consciously exposing himself to such dangers. In the hypothetical, counsel might argue that because *P* voluntarily chose not to wear his helmet, he manifestly indicated that he was assuming the risks of injury in the event of a collision.

On its face, the theory appears to fit nicely with the assertion of the "helmet defense"; however, there are some significant difficulties in its application. First, the doctrine is similar in some respects to contributory negligence;[175] therefore, if there is an overlap between the two available

not mean that critical evidence should be disregarded. Its relevance is apparent. The test should be not when the challenged activity or nonactivity took place; rather, the focus should be whether it played a part in producing the event or was unrelated to that event and affected only the injury. The inquiry should not be chronological, but causal.

Id. at 771 (Weis, J., concurring and dissenting).

172. *E.g.*, Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867 (W.D. Pa. 1975).

173. *See* notes 159, 165, and text accompanying notes 139-44 *supra.*

174. Dean Prosser classifies the doctrine of assumption of risk into three broad situations:

In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. . . .

A second, and closely related situation, is where the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against the risk. He may then be regarded as tacitly or impliedly consenting to the negligence, and agreeing to take his own chances. . . .

In the third type of situation the plaintiff, aware of a risk already created by the negligence of the defendant, proceeds voluntarily to encounter it. . . .

PROSSER, *supra* note 56, § 68, at 440.

175. Dean Prosser distinguishes the two doctrines:

[T]he traditional basis has been that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of a reasonable man, however unaware, unwilling, or even protesting the plaintiff may be. Obviously the two may co-exist when the plaintiff makes an unreasonable choice to incur the risk; but either may exist without the other.

PROSSER, *supra* note 56, § 68, at 441. Dean Prosser points this out with a common example:

theories, it is usually easier to assert contributory negligence than assumption of risk since the former theory is based on the conduct of a reasonable man while the latter entails a subjective element.[176]

Second, as the definition indicates, counsel must demonstrate that *P* knew, appreciated, and voluntarily encountered the risk.[177] Accordingly, an inquiry must be made into the precise risk *P* voluntarily encountered when he decided to ride helmetless. Although *P* undoubtedly risks some dangers of the road, the theory requires that he knew the specific risk he was encountering. While for purposes of contributory negligence *P*'s forseeability need only extend to the general hazards of cycling on highways, assumption of risk would require *P* to appreciate and accept the risk of a collision with *D*. Clearly *P* did not consciously accept and consent to the negligence of *D* so as to relieve *D* of his duty to drive with care. The most *P* can be said to consciously risk are the consequences of the accident, and not the accident itself brought about by *D*'s negligence. The *Rogers* court, in rejecting counsel's assumption of risk argument, pointed this out:

> The doctrine . . . rests upon an intentional and voluntary exposure to a known risk and, therefore, consent on the part of the plaintiff to relieve the defendant of an obligation of conduct toward him and to take his chances from the harm from a particular risk. . . .
>
> Vastly increased traffic, if nothing more, means that an eastern shore of Maryland resident who elects to shop in Baltimore City rather than in one of the towns of the central portion of the Delmarva Peninsula is exposed to greater risk of injury. A defendant in an action brought by such resident could not raise assumption of risk, however, on the ground that once one ventured across the Bay Bridge one assumed the consequences of that traffic, because there would be no consent on the part of the plaintiff to relieve the defendant of the consequences. . . . The conduct of young Frush here in riding a motorcycle without a helmet, even if he had knowledge and appreciated the risk, was not an act by which he relieved Mrs. Rogers of her obligation to operate her vehicle in a careful and prudent manner. . . .[178]

The same reasoning has been applied by the courts in the seat belt cases.[179]

> A pedestrian who walks across the street in the middle of a block, through a stream of traffic traveling at high speed, cannot by any stretch of the imagination be found to consent that drivers shall not use care to avoid running him down. On the contrary, he is insisting that they shall. This is contributory negligence pure and simple; it is not assumption of risk.

Id. at 445.

176. *E.g.*, the seat belt case of Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867 (W.D. Pa. 1975), notes that similar considerations are within the assumption of risk defense as are present in contributory negligence but the former is more difficult to establish since it requires the actor's "deliberate participation in a known peril." *Id.* at 874 n.9.

177. PROSSER, *supra* note 56, at 447.

178. 257 Md. 233, 243-44, 262 A.2d 549, 554 (1970).

179. *See* Kleist, *The Seat Belt Defense: An Excercise in Sophistry, supra* note 121, at 620, in which he argues that "it could hardly be said that when the plaintiff steps into his car he is relieving defendant of the duty to drive carefully, or that the plaintiff is consenting to 'assume the risk' of defendant's negligent manipulation of his automobile." *See also* Kleist, *The Seat Belt Defense: A New Approach*, 18 HASTINGS L.J. 613 (1967); Comment, *The Seat Belt Defense: A New Approach*, 38 FORDHAM L. REV. 94 (1969); Woods v. Smith, 296 F. Supp. 1128, 1129 (N.D. Fla. 1969); Horn v. Gen-

It is for these reasons that defense counsel will have insurmountable difficulties urging a court to accept the "helmet defense" under the assumption of risk theory. Instead, counsel should divert his efforts toward the other theories.

VI. CONCLUSIONS

It is inevitable that defense counsel can expect increasing opportunities to assert the "motorcycle helmet defense" in the future. In fact, it should be only a matter of time before the "helmet defense" emerges with full force commensurate with that of the "seat belt defense." Although courts at times have been reluctant to accept the latter, they may be under increasing pressure to adopt the former. Based on the result reached by the *Holland* court and the above-posited legal justifications for the theories upon which the "helmet defense" can be asserted, defense counsel has ample ammunition in representing a negligent motorist such as *D* in the hypothetical. Although helmetless cyclists may be easy riders, they must face the hard facts that in bringing personal injury suits, they may not recover for injuries that could have been avoided or reduced by their simply wearing helmets.

Finally, the tone of this article is obviously directed to defense attorneys seeking to establish the "helmet defense" in judicial forums; however, the same messages should be equally clear to the states' legislatures. If the courts are hesitant in allowing the "helmet defense," the legislatures, who are not bound by common law, should acknowledge the equitable application and results of the "helmet defense" and follow the lead of the Minnesota legislature in enacting some form of damage apportionment for civil actions of this type. Perhaps, in those twenty state legislatures in which helmet laws remain under attack by the "freedom of choice" advocates, a trade-off can be made by repealing the statutes while enacting provisions similar to those of the Minnesota statute.[180] In any event, it is hoped that defense attorneys and defendants will not *have* to rely on changes from the state legislatures—those changes should certainly be forthcoming from the courts.[181]

Clay P. Graham

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eral Motors Corp., 17 Cal. 3d 359, 551 P.2d 398 (1976); Kavanah v. Butorac, 140 Ind. App. 139, 155, 221 N.E.2d 824, 833 (1966); Miller v. Haynes, 454 S.W.2d 293, 300 (Mo. Ct. App. 1970).

180. *See* note 68 *supra*.

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