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Cynthia Wagner Goulet

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Negligence—Damages—Expert Testimony on Plaintiff Motorcyclist's Nonuse of a Helmet is Admissible Evidence on Issue of Damages

Kevin Halvorson, age eighteen, suffered a severe head injury when the motorcycle he was operating collided with a truck driven by Neil Voeller.[1] Prior to trial, Voeller indicated an intention to introduce as evidence a physician's testimony[2] to show that Halvorson's head injuries would have been less severe had he been wearing a helmet. Halvorson made a motion *in limine*[3] to prevent presentation of his nonuse of a helmet on either the issue of liability or damages.[4] The district court granted Halvorson's motion.[5] Subsequently, a jury found Voeller ninety-two percent negligent and Halvorson eight percent negligent in causing the accident[6] and

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1. Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983). The plaintiff brought this action as guardian and conservator of his son. *Id.*

2. *Id.* at 119. The proffered testimony was that of a qualified neurosurgeon who had examined Kevin Halvorson about a year after his injury. The neurosurgeon was willing to testify that had Halvorson worn a helmet, the potential for the type of brain injury he sustained would have been lessened or eliminated. Deposition of Witness at 34-38, Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983).

3. 336 N.W.2d at 119. A motion *in limine* is a written motion usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements. Beasley v. Huffman Mfg. Co., 97 Ill. App. 3d 1, 5, 422 N.E.2d 241, 244 (1981).

4. 336 N.W.2d at 119.

5. *Id.* In its answer to defendant's contention that it had abused its discretion in not allowing testimony on Halvorson's failure to wear a helmet, the trial court reasoned:

> In the absence of legislation imposing a statutory duty for helmet usage for motorcycle riders over the age of eighteen, this court finds it would have been improper to establish a common law duty of care. . . . Just as evidence of use or nonuse of seat belts is inadmissible, the evidence of use or nonuse of motorcycle helmets is also inadmissible.

Id.

6. *Id.* The accident occurred when the defendant, who had stopped at a stop sign, moved north

awarded Halvorson $2,767,324.61 in damages.[7] Voeller appealed for a new trial and contended that the trial court had abused its discretion in not allowing testimony on Halvorson's failure to wear a helmet.[8] The North Dakota Supreme Court *held* that evidence of a person's failure to wear a protective helmet while traveling on a motorcycle is admissible to reduce the plaintiff's damages so long as there is competent testimony by a qualified expert that the use of a helmet would have lessened the injuries the plaintiff sustained.[9]

In 1966[10] the New York Legislature enacted the first mandatory helmet use law,[11] which prohibited any person from riding a motorcycle without wearing state-approved headgear.[12] During that same year, the United States Congress passed the Highway Safety Act,[13] which required each state to implement a highway safety program under standards to be set by the Secretary of Transportation (Secretary). In the event of noncompliance with the Secretary's standards, the Act authorized the Transportation Department to withhold certain federal highway funds from the uncooperative states.[14] In June 1967 the Secretary promulgated a highway safety program entitled "Motorcycle Safety" and required the states to enact mandatory helmet use laws.[15] During the next nine years, all but three states substantially complied with

into an intersection. *Id.* Halvorson was traveling from the west on a motorcycle. *Id.* Halvorson had no traffic control signal to yield to. Brief for Appellee at 7, Halvorson v. Voeller, 336 N.W.2d at 119. Defendant was legally blind in his left eye. *Id.*

7. 336 N.W.2d at 119.

8. *Id.*

9. *Id.* at 121. The court in *Halvorson* explained that its holding places upon the defendant the burden of proving (1) that a reasonably prudent person would have worn a helmet and (2) that the plaintiff's failure to wear a helmet increased his injuries. *Id.* The latter must be shown by competent eivdence of a qualified expert. *Id.* Only if the jury answers the first question affirmatively, that is, it decides that the failure to wear a helmet is a breach of the duty to exercise ordinary care, may it go on to review the expert testimony and apportion damages. *Id.*

10. For a discussion on the historical background of helmet laws, see Note, *Helmetless Motorcyclists — Easy Riders Facing Hard Facts: The Rise of the "Motorcycle Helmet Defense,"* 41 OHIO ST. L.J. 233 (1980).

11. Act of Aug. 2, 1956, ch. 979, 1966 N.Y. Laws 3307 (codified as amended at N.Y. VEH. & TRAF. LAW § 381 (McKinney 1970)).

12. *See* State v. Stouffer, 28 Ohio App. 229, 276 N.E.2d 651 (1971). In *Stouffer* the Court of Appeals for Franklin County construed "protective helmet" as used in Ohio's helmet statute and stated:

> Webster's Third New International Dictionary defines "helmet" as "any of various protective head coverings USU. made of a 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.

Id. 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, 80 Stat. 731 (1966) (codified as amended at 23 U.S.C. §§ 401-04).

14. *Id.* § 402(c). The Highway Safety Act directed the Secretary of Transportation 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).

the standard.[16] North Dakota's mandatory helmet use law became effective July 1, 1967.[17]

Constitutional challenges to mandatory helmet laws rapidly followed the passage of these laws.[18] A majority of courts upheld the laws as being within the purview of the states' police power.[19] A minority of decisions held otherwise.[20]

The constitutional arguments[21] generally have followed two lines of reasoning, one attacking mandatory helmet laws as an ends and one attacking helmet laws as a means. Under the ends argument, challengers of the mandatory helmet use laws claim that the laws are an improper exercise of a state's police power because they do not bear a substantial relationship to the protection of the

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16. *See* 1969 Ill. Laws Pub. Act No. 76-1586, § 11-1404 (codified as amended at ILL. ANN. STAT. ch. 95½, § 11-1404 (Smith-Hurd 1971)). The Illinois Supreme Court found the mandatory helmet use law unconstitutional. People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149 (1969). Utah's helmet law requires helmet use only on roads with a posted speed limit of greater than 35 miles per hour. UTAH CODE ANN. § 41-6-107.8 (1970). California never enacted a mandatory helmet use law.

17. Act of Mar. 14, 1967, ch. 322, § 1, 1967 N.D. Sess. Laws 650 (initially codified at N.D. CENT. CODE § 39-21-48 (1967)) (repealed 1975). Session 39-21-48 provided:

> Every operator of and passenger on a motorcycle. . . shall at all times when such motorcycle is in motion be required to wear a crash helmet of a type and meeting the standards approved and established by the motor vehicle registrar, provided, however, such helmets shall not be required to be worn when such motorcycle is driven in a parade or ceremonial conducted or permitted under local ordinances.

Id.

18. *See* Note, *supra* note 10 (challengers of helmet laws allege that the laws violate due process guarantees and equal protection norms). *See also* Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355 (1969) [hereinafter cited as *Motorcycle Helmets*] (challengers allege helmet laws do not relate to public health and welfare).

19. *See, e.g.*, City of Adrian v. Poucher, 398 Mich. 316, 247 N.W.2d 798 (1976) (in furthering highway safety, the legislature may design a highway safety program to reduce the consequences of accidents); People v. Schmidt, 54 Misc.2d 702, 283 N.Y.S.2d 290 (1967) (regulation of privilege of driving motorcycle upon public highway is a legitimate use of state's police power); People v. Bielmeyer, 54 Misc.2d 466, 282 N.Y.S.2d 979 (1967) (state has right to reasonably regulate how riders of vehicles susceptible to special dangers should protect themselves on public property); State v. Odegaard, 165 N.W.2d 677 (N.D. 1969) (a real and substantial relationship exists between the exercise of police powers contained in the helmet statute and the public health, safety, and welfare); Bisenius v. Karns, 42 Wis.2d 42, 165 N.W.2d 377 (purpose of helmet statute is to benefit public and it may properly be used to minimize consequences of and number of accidents), *appeal dismissed*, 395 U.S. 709 (1969).

20. *See, e.g.*, People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149 (1969) (legislature may not, under guise of protecting public interest, interfere with private rights); Everhardt v. City of New Orleans, 208 So.2d 423 (La. Ct. App. 1968) (helmet statute deprives individual of liberty without promoting a purpose beneficial to public at large); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968) (helmet law has no relationship to public health, safety, and welfare and, although it did have relationship to protection of individual motorcyclist, legislature cannot infringe upon an individual's right to be left alone), *rev'd sub nom.*, City of Adrian v. Poucher, 67 Mich. App. 133, ____, 240 N.W.2d 298, 300, *aff'd*, 398 Mich. 316, 247 N.W.2d 798 (1976); People v. Smallwood, 52 Misc.2d 1027, 277 N.Y.S.2d 429 (1967) (helmet statute unconstitutionally removes from individual the right to exercise his judgment in use of personal adornment); State v. Betts, 21 Ohio Misc. 175, 252 N.E.2d 866 (Franklin County Mun. Ct. 1969) (helmet statute is significant encroachment upon personal liberty and state failed to show compelling interest).

21. For a comprehensive discussion concerning the constitutionality of helmet laws, see *Motorcycle Helmets*, *supra* note 18 (majority of states hold helmet laws are within purview of states' police power). *See also* Annot., 32 A.L.R.3D 1270, 1273 (1970) (majority of states hold that helmet laws are sufficiently related to public health, safety, and welfare, and do not violate equal protection norms).

general public, but serve only to protect the individual motorcyclist from himself.[22] Consequently, the laws infringe upon the motorcyclist's constitutionally protected right of privacy, right to be left alone, and right to select one's own wearing apparel.[23]

Under the means argument, opponents of helmet laws assert that the laws are an unreasonable means of achieving the state's purported ends. The laws allegedly violate equal protection norms because they discriminate against a single class of motorcycle operators[24] and are ineffective in remedying perceived problems.[25]

Prior to its repeal, North Dakota's mandatory helmet use law[26] had been challenged once. In *State v. Odegaard*[27] the supreme

22. American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968). The plaintiff brought an action to obtain a declaratory judgment on the constitutionality of Michigan's helmet law. *Id.* The Michigan Court of Appeals noted: "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 ____, 158 N.W.2d at 76-77. *See also* People v. Carmichael, 53 Misc. 2d 584, 279 N.Y.S.2d 272 (1967). In *Carmichael* the New York Court of Special Sessions, Genesee County, said: "[T]he police power does not authorize statutes requiring a citizen to protect his own physical well being." *Id.* at ____, 279 N.Y.S. 2d at 278.

23. 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 of man 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)' ") (citation omitted).

24. Everhardt v. City of New Orleans, 208 So.2d 423 (La. Ct. App. 1968). In *Everhardt* the Louisiana Court of Appeals upheld the equal protection argument and explained: "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.

25. Note, *supra* note 10, at 236-37 n.25. Opponents of 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 reduce the cyclist's hearing; and (3) that helmets dangerously restrict a rider's peripheral vision. *Id.* These claims, however, are severely weakened by numerous studies and reports advocating the effectiveness of helmets in reducing head injuries. *See, e.g.*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., UNITED STATES DEP'T OF TRANSP., DOT-HS-805-312, A REPORT TO CONGRESS ON THE EFFECT OF MOTORCYCLE HELMET USE LAW REPEAL — A CASE FOR HELMET USE (April 1980) [hereinafter cited as REPORT]; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., UNITED STATES DEP'T OF TRANSP., DOT-HS-801-759, TECHNICAL NOTE ON THE EFFECT OF SAFETY HELMETS ON AUDITORY CAPABILITY (September 1975); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., UNITED STATES DEP'T OF TRANSP., DOT-HS-801-758, TECHNICAL REPORT ON THE FIELD OF VIEW WITH AND WITHOUT MOTORCYCLE HELMETS (September 1975).

26. For the text of North Dakota's original mandatory helmet use law, see *supra* note 17. This law has since been amended. Act of Apr. 22, 1977, ch. 355, §§, 1977 N.D. Sess. Laws 786 (codified as amendment at N.D. CENT. CODE § 39-10.2-06 (1977)). The current statute reads in pertinent part:

> No person under the age of eighteen years shall operate or ride upon a motorcycle unless protective headgear, which complies with standards established by the department, is being worn on the head of the operator and rider, except when participating in a lawful parade. If the operator of a motorcycle is required to wear protective headgear, any passenger must also wear protective headgear regardless of the age of the passenger.

N.D. CENT. CODE § 39-10.2-06 (1977).

27. 165 N.W.2d 677 (N.D. 1969). In *Odegaard* the defendant had been convicted of failure to wear a statutorily-required helmet. State v. Odegaard, 165 N.W.2d 677, 678 (N.D. 1969). He appealed, alleging that the statute was an unconstitutional use of the state's police power and that it abridged his personal liberty. *Id.*

court held that the state's police power is broad enough to include the legitimate interest of protection of an individual from the consequences of his own carelessness.[28] The court in *Odegaard* added that even if the mandatory helmet use law deprived an individual of certain personal freedoms and constitutionally protected rights of the due process clause, it would not find the law unconstitutional because a legislature may take reasonable measures to prevent persons from becoming public charges, which is often the result of the costs of the lengthy hospitalization period required by brain injury cases.[29]

The conflict grew between the federal government and three states that had refused to enact mandatory helmet use legislation.[30] In 1975 the Transportation Department began sanction proceedings against these states, which would have resulted in withdrawal of substantial federal highway funding.[31] However, these proceedings were blocked when Congress passed the Highway Safety Act of 1976.[32] This Act withdrew from the Secretary of Transportation the authority to require state helmet laws.[33]

Inevitably, this Act cleared the way for the repeal of helmet laws by legislators who were influenced by their constituents' ardent "freedom of choice" arguments. Within the first year of the Act, nine states repealed their helmet laws.[34] During 1977 fourteen

28. *Id.* at 679. The court in *Odegaard* continued that the requirement of protective headgear for the exposed operator will enhance the motorcyclist's road performance by protecting him from loose stones kicked up by passing vehicles or fallen objects such as windblown tree branches that could cause the motorcyclist to lose control and become a menace to other vehicles on the highway. *Id. But cf.* State v. Betts, 21 Ohio Misc. 175, 175, 252 N.E.2d 866, 866 (Franklin County Mun. Ct. 1969). The *Betts* court stated that not only does wearing a helmet not alleviate any real and substantial public danger, but also that "[i]ncluded in a man's 'liberty' is the freedom to be as foolish, foolhardy or reckless as he may 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 ____, 252 N.E.2d at 872.

29. 165 N.W.2d at 677.

30. Note, *supra* note 10, at 238. The three states that refused to enact helmet legislation were California, Illinois, and Utah. *Id.* at 238.

31. *Id.*

32. Highway Safety Act of 1976, Pub. L. No. 94-280, 90 Stat. 451 (1976).

33. *Id.* § 280(a). Senator Alan Cranston offered the amendment to the Highway Safety Act of 1976 that withdrew from the Secretary of Transportation the authority to require state helmet laws on behalf of his state of California, which was in danger of losing $50 million in federal highway funding. 121 CONG. REC. 40, 261 (1975) (statement of Sen. Cranston).

34. The nine states are: Alaska (*see* 1976 Alaska Sess. Laws ch. 230 (amending ALASKA STAT. § 28.35.245 (1978)) (applies only to minors)); Arizona (*see* 1976 Ariz. Sess. Laws ch. 57, § 2 (amending ARIZ. REV. STAT. ANN. § 28-964 (West 1976)) (applies to those under the age of 18)); Connecticut (*see* 1976 Conn. Pub. Acts 76-236, § 1 (repealing CON. GEN. STAT. ANN. § 14-289c (West 1970 & Supp. 1977))); Iowa (*see* 1976 Iowa Acts ch. 1245, § 527 (repealing IOWA CODE ANN. § 321.446 (West Supp. 1979-80))); Kansas (*see* 1976 Kan. Sess. Laws ch. 51 § 1 (amending KAN. STAT. § 8-1598 (Supp. 1979)) (applies to those under the age of 16) *amended by* 1979 Kan. Sess. Laws ch. 41, § 1 (applies to those under the age of 18)); Louisiana (*see* 1976 La. Acts No. 671, § 1 (amending LA. REV. STAT. ANN. § 32:190 (West Supp. 1980))); Oklahoma (*see* 1976 Okla. Sess. Laws ch. 81, § 1 (amending OKLA. STAT. ANN. tit. 47, § 40-105 (West Supp. 1979)) (applies to those under the age of 18)); Rhode Island (*see* 1976 R.I. Pub. Laws ch. 104, § 1 (amending R.I. GEN. LAWS § 31-10.1-4 (1969 & Supp.

states,[35] including North Dakota,[36] joined the movement and repealed their helmet laws. In 1978 four more states followed.[37] Only a few states have successfully staved off the helmet laws repeal movement.[38]

The helmet defense is of relatively recent origin,[39] appearing in only four jurisdictions[40] to date. The defense is predicated on a general theory of mitigation in which evidence of the plaintiff's failure to use a helmet is directed toward the issue of damages rather than the issue of liability.[41] This is believed to be the most

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1978))); South Dakota (*see* 1976 S.D. Sess. Laws ch. 194, § 1 (amending S.D. COMP. LAWS ANN. § 32-20-4 (1976)) (applies to those under the age of 18)).

35. The fourteen states are: Colorado (*see* 1977 Colo. Sess. Laws 1899, §§ 1, 2 (repealing COLO. REV. STAT. § 42-4-231 (2) (1973 & Supp. 1978))); Hawaii (*see* 1977 Hawaii Sess. Laws Act 183, § 1 (amending HAWAII REV. STAT. § 286-81 (1976)) (applies to those under the age of 18)); Indiana (*see* 1977 Ind. Acts Pub. L. No. 135, § 1 (repealing IND. CODE ANN. § 9-8-9-3 (Burns 1973))); Maine (*see* 1977 Me. Acts ch. 22 (repealing ME. REV. STAT. tit. 29, § 1373 (1967))); Minnesota (*see* 1977 Minn. Laws ch. 17, § 2 (amending MINN. STAT. ANN. § 169.974 (West Supp. 1980)) (applies to those under the age of 18)); Montana (*see* 1977 Mont. Laws ch. 54, § 1 (amending MONT. REV. CODE ANN. § 61-9-417 (1979)) (applies to those under the age of 18)); Nebraska (*see* 1977 Neb. Laws, Leg. Bill 314, § 7 (repealing NEB. REV. STAT. § 60-403.02 (1978))); New Hampshire (*see* 1977 N.H. Laws ch. 173:1 (amending N.H. REV. STAT. ANN. § 263:29-b (Supp. 1979)) (applies to those under the age of 18)); Oregon (*see* 1977 Or. Laws ch. 410, § 291 (amending OR. REV. STAT. § 487.730 (1967)) (applies to those under the age of 18)); Texas (*see* 1977 Tex. Gen. Laws ch. 162, § 1 (amending TEX. REV. CIV. STAT. ANN. art. 6701c-3, § 2 (Vernon 1977)) (applies to those under the age of 18)); Utah (*see* 1977 Utah Laws ch. 267 § 1 (amending UTAH CODE ANN. § 41-6-107.8 (Supp. 1979)) (applies to those under the age of 18)); Washington (*see* 1977 Wash. Laws ch. 355, § 55 (repealing WASH. REV. CODE ANN. § 46.37.530 (1970))); Wisconsin (*see* 1977 Wis. Laws ch. 204, § 1 (amending WIS. STAT. ANN. § 347-485 (West 1971)) (applies to those under the age of 18)).

36. *See* 1977 N.D. Sess. Laws ch. 355, § 3 (amending N.D. CENT. CODE § 39-10.2-06 (Supp. 1979) (applies to those under the age of 18)).

37. The four states are: Delaware (*see* 61 Del. Laws ch. 314 (1978) (amending DEL. CODE tit. 21, § 4185 (1979)) (those over the age of 18 must have helmet in possession, those under the age of 18 are required to wear it)); Idaho (*see* 1978 Idaho Sess. Laws ch. 323, § 1 (amending IDAHO CODE § 49-761A (1967)) (applies to those under the age of 18)); New Mexico (*see* 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 (1978)) (applies to those under the age of 18)); Ohio (*see* Ohio Laws 5-47 (amending OHIO REV. CODE ANN. § 4511.53 (Page 1973 & Supp. 1978)) (applies to those under the age of 18)).

38. 13 HIGHWAY, HEALTH AND SAFETY, THE HIGHWAY LOSS REDUCTION STATUS REPORT, Nos. 8, 11. The governors of the following three states have successfully vetoed helmet repeal efforts: Maryland, 1978; Massachusetts, 1978; and Virginia, 1977. *Id.* 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 to require helmets only on minors. *See* 1979 Md. Laws ch. 746 (amending MD. TRANSP. CODE ANN. § 21-1306 (1977)).

39. *See* Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970). *Rogers* is the first reported case employing the so-called "helmet defense."

40. *See id.* (although failure to wear helmet may be relevant to issue of damages, helmet defense is not available under doctrines of avoidable consequences or assumption of risk); Burgstahler v. Fox, 290 Minn. 495, 186 N.W.2d 182 (1971) (evidence of nonuse of helmet not relevant because no statutory duty to wear helmet existed at time of accident); Dean v. Holland, 76 Misc. 2d 517, 350 N.Y.S.2d 859 (1973) (omission to wear a helmet may be relevant and material on issue of injuries and damages but is not relevant to issue of liability); Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983) (helmet defense is irrelevant to issue of liability and should be limited to issue of damages).

41. *See, e.g.*, Garrett v. Desa Indust., Inc., 705 F.2d 721 (4th Cir. 1983) (failure to use safety goggles is admissible on issue of damages but not on issue of liability); Caiazzo v. Volkswagenwerk

appropriate use of such evidence. Proponents of the mitigation theory argue that since a defendant is liable only for those injuries that he proximately caused,[42] he should not be responsible for injuries resulting from the plaintiff's failure to wear a helmet.[43]

The mitigation theory of the helmet defense advances several different approaches. Under one approach, the plaintiff's nonuse of a helmet is an alleged violation of his duty to exercise ordinary care for his own safety and, therefore, he is contributorily negligent.[44] Inherent in this approach is a need by the plaintiff to anticipate the defendant's lack of due care toward him.[45] The theory, when viewed in light of traditional tort doctrine that one is not under a duty to anticipate the negligent acts of another,[46] is afforded little viability. Additionally, the adoption of comparative negligence by North Dakota[47] has abrogated the defense of contributory negligence in this state.[48]

A second approach to the introduction of helmet evidence charges that failure to wear a helmet amounts to the motorcyclist's assuming the risk of consequences of an accident.[49] Courts may

A.G., 647 F.2d 241 (2d Cir. 1981) (failure to use seat belt is admissible evidence concerning damages but not liability); Benner v. Interstate Container Corp., 73 F.R.D. 502 (E.D. Pa. 1977) (nonuse of seat belt may be considered in mitigation of damages but not on issue of liability); Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (Cal. Ct. App. 1982) (nonuse of seat belt relevant only on issue of damages); Wagner v. Zboncak, 111 Ill. App. 3d 258, 443 N.E.2d 1085 (1982) (nonuse of seat belt relevant only to issue of damages and not to issue of negligence); Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974) (nonuse of motorcycle helmet may be considered on issue of damages only).

42. *See* Sevrinson v. Nerby, 105 N.W.2d 252 (N.D. 1960). In *Sevrinson* the North Dakota Supreme Court identified the theory of proximate cause as a judicially imposed limitation placed upon an actor's responsibility for the consequences of his conduct. *Id.* at 255.

43. Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272, 275 (1980).

44. *See* Potts v. Armour & Co., 183 Md. 483, 39 A.2d 552 (1944). In *Potts* the Maryland Supreme Court set forth a definition of contributory negligence: "It [contributory negligence] is the doing of something that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do, under the circumstances." *Id.* at 486, 39 A.2d at 556.

45. *See generally* W. PROSSER, THE LAW OF TORTS § 65, at 416-27 (4th ed. 1971). A measure of contributory negligence is the need, in a given situation, to anticipate danger; but one may be charged only with notice of what a reasonable and prudent person would have foreseen. *Id.*

46. *See, e.g.*, Lafferty v. Allstate Ins. Co., 425 So.2d 1147 (Fla. Dist. Ct. App. 1982) (in absence of a statutory duty, plaintiff is not under any duty to wear a seat belt); Amend v. Bell, 89 Wash.2d 124, 570 P.2d 138 (1977) (plaintiff did not have a duty to anticipate defendant's negligence and, therefore, did not breach a duty by failing to wear seat belt).

47. *See* N.D. CENT. CODE § 9-10-07 (1975). Section 9-10-07 reads in pertinent part:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence. . . attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering.

Id.

48. *See* Wentz v. Deseth, 221 N.W.2d 101, 104 (N.D. 1974) (with adoption of the doctrine of comparative negligence, the affirmative defense of contributory negligence is no longer available).

49. Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970) (defendant claimed that plaintiff's

dispose of this theory by refusing to find that a plaintiff voluntarily exposed himself to a known danger or consented to the defendant's negligent conduct thereby relieving the defendant of his duty to act with due care.[50] Again, the adoption of comparative negligence by North Dakota has abrogated the defense of assumption of risk in that state.[51]

A third approach forming a basis for the helmet defense is the doctrine of avoidable consequences, which is sometimes called the doctrine of mitigation of damages.[52] The doctrine places a duty upon an injured plaintiff to exercise reasonable diligence in avoiding or minimizing the consequences of a defendant's wrong.[53] However, courts frequently have determined that an application of this doctrine is inappropriate in cases in which the failure to mitigate damages is allegedly due to an act that occurs before, and not after, the plaintiff has sustained injury.[54] Notwithstanding such holdings, Dean Prosser states that so long as damages can be accurately apportioned to their respective causes, it makes no difference whether the plaintiff's negligence in aggravating his injuries preceded or succeeded the defendant's negligence.[55]

A fourth approach giving rise to the helmet defense is found in the Restatement (Second) of Torts, section 465.[56] Comment c[57] to

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failure to wear helmet amounted to plaintiff's assuming the risk of the consequences of the accident). The elements of the assumption of risk doctrine include an intentional and voluntary exposure to a known danger and, therefore, consent by the plaintiff to relieve the defendant of obligation of conduct toward him and to take his chances from harm from a particular risk. *Id.* at 554. *See also* Wentz v. Deseth, 221 N.W.2d 101, 103 (N.D. 1974) (elements of assumption of risk are knowledge of an abnormal danger, voluntary exposure to it, freedom of choice to avoid it, and injury proximately caused by the abnormal danger).

50. Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970). In *Rogers* the Maryland Court of Appeals noted that the doctrine of assumption of risk rests upon an intentional and voluntary exposure to a known danger. *Id.* at 238, 262 A.2d at 554.

51. 221 N.W.2d at 102, 104 (with the adoption of comparative negligence, the affirmative defense of asumption of risk is no longer available).

52. PROSSER, *supra* note 45, § 65, at 422-24. The doctrine of avoidable consequences is a rule of damages that denies a plaintiff recovery for any damages that can be avoided by reasonable conduct. *Id.* The rule traditionally applies to a situation in which a legal wrong has occurred, but some damages attributable to that wrong can still be avoided. *Id.* See *supra* note 41 for cases that have applied this doctrine.

53. PROSSER, *supra* note 45, § 65, at 422-24.

54. *See, e.g.*, Fischer v. Moore, 183 Colo. 392, 517 P.2d 458 (1973) (allowing the seat belt defense would penalize the injured motorist and provide the tortfeasor with a fortuitous windfall); Lafferty v. Allstate Ins. Co., 425 So.2d 1147 (Fla. Dist. Ct. App. 1982) (evidence of enhanced injuries from failure to wear seat belt is mere hindsight and not admissible); Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970) (doctrine of avoidable consequences not applicable since failure to wear helmet was an event occurring before rather than after injury); Fields v. Volkswagen of America, 552 P.2d 48 (Okla. 1976) (one's duty to mitigate damages cannot arise before he is damaged); Amend v. Bell, 89 Wash.2d 124, 570 P.2d 138 (1977) (plaintiff is not required to predict the negligence of defendant).

55. PROSSER, *supra* note 45, § 65, at 422-24.

56. RESTATEMENT (SECOND) OF TORTS § 465 (1965). Section 465 states:

> (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 relationship between the plaintiff's

this section, which deals with the causal relation between the harm and plaintiff's negligence, states that damages may be apportioned when the antecedent negligence of the plaintiff, even though it does not contribute in any way to the original accident or injury, is a substantial contributing factor in increasing the harm that ensues.[58]

A fifth approach used to introduce helmet evidence to mitigate damages is available in states that have adopted the doctrine of comparative negligence.[59] North Dakota's comparative negligence statute became effective July 1, 1973.[60] Since comparative negligence is geared toward apportioning damages between parties according to fault,[61] the helmet evidence aids the jury in determining the degree of fault of the respective parties.[62]

> 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.

Id. at 510.

57. RESTATEMENT (SECOND) OF TORTS § 465 comment c (1965). Comment c states that damages may be apportioned:

> 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. There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation.

Id.

58. *Id.*

59. *See* Placek v. Sterling Heights, 405 Mich. 638, 653, 275 N.W.2d 511, 515 (1979) (judicially adopting comparative negligence in Michigan). The following states have adopted comparative negligence for use in tort actions: Arkansas (*see* ARK. STAT. ANN. 1947 §§ 27-1763 to 27-1765 (1979)); Colorado (*see* COLO. REV. STAT. § 13-21-111 (1974, amended in part, Supp. 1983)); Connecticut (*see* CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1984)); Hawaii (*see* HAWAII REV. STAT. § 663.31 (1976)); Idaho (*see* IDAHO CODE §§ 6-801 to 6-806 (1979)); Indiana (*see* IND. CODE ANN. § 34-4-33-3 (Burns Supp. 1983, effective January 1, 1985)); Iowa (*see* IOWA CODE ANN. § 619.17 note (West Supp. 1983-84)); Kansas (*see* KAN. STAT. ANN. §§ 60-258a, 60-258b (1983)); Maine (*see* ME. REV. STAT. ANN. tit. 14, § 156 (1980)); Massachusetts (*see* MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1983-84)); Minnesota (*see* MINN. STAT. ANN. § 604.01 (West Supp. 1984)); Mississippi (*see* MISS. CODE ANN. § 11-7-15 (1972)); Montana (*see* MONT. CODE ANN. §§ 27-1-702, 27-1-703 (1982)); Nebraska (*see* NEB. REV. STAT. § 25-1151 (1977)); Nevada (*see* NEV. REV. STAT. § 41.141 (1979)); New Hampshire (*see* N.H. REV. STAT. ANN. § 507.7-a (1983)); New Jersey (*see* N.J. REV. STAT. §§ 2A:15-5.1 to 2A:15-5.3 (Supp. 1983-84)); New York (*see* N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976)); North Dakota (*see* N.D. CENT. CODE § 9-10-07 (1975)); Oklahoma (*see* OKLA. STAT. ANN. tit. 23, § 13 (West. Supp. 1983-84)); Oregon (*see* OR. REV. STAT. § 18.470 (1983)); Pennsylvania (*see* PA. CONS. STAT. ANN. § 7102 (Purdon 1982)); Rhode Island (*see* R.I. GEN. LAWS § 9-20-4 (Supp. 1983)); South Dakota (*see* S.D. CODIFIED LAWS ANN. § 20-9-2 (1979)); Texas (*see* TEX. CIV. CODE ANN. § 2212a. (Vernon Supp. 1984)); Utah (*see* UTAH CODE ANN. § 78-27-37 (1977)); Vermont (*see* VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983)); Washington (*see* WASH. REV. CODE ANN. §§ 4.22.005 to 4.22.920 (Supp. 1984-85)); Wisconsin (*see* WIS. STAT. ANN. § 895.045 (Supp. 1983-84)); Wyoming (*see* WYO. STAT. § 1-1-109 (1977)).

60. 1973 N.D. Sess. Laws ch. 78 § 1 (codified at N.D. CENT. CODE § 9-10-07). See *supra* note 47 for the text of § 9-10-07.

61. Prosser, *Compartive Negligence*, 51 MICH. L. REV. 465 (1953). The author stated that "recoverable damages must be reduced in the proportion which the plaintiff's fault, or the extent of his departure from the required standard of conduct, bears to the total fault of plaintiff and defendant." *Id.* at 482.

62. *See* Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977). The Washington Supreme Court in *Amend* explained that under the doctrine of comparative negligence, the trier of facts must hear the totality of fault; it must look at all of the proximate causes of the collision and of its consequent injuries. *Id.* at 128, 570 P.2d at 142.

The first reported case raising the helmet defense is the 1970 Maryland decision of *Rogers v. Frush.*[63] In *Rogers* 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.[64] On appeal from a judgment for the plaintiff, defendant claimed the trial court erred in excluding medical testimony[65] offered to prove that: (1) the son'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 son could have avoided certain consequences of the accident, he should not recover for those injuries that could have been prevented by his wearing a helmet.[66] The court rejected each of these theories of the helmet defense[67] and affirmed the judgment for the plaintiff.[68]

The next reported helmet defense case is the 1971 Minnesota Supreme Court decision of *Burgstahler v. Fox.*[69] At trial, the defense counsel attempted to cross-examine the plaintiff on his nonuse of a helmet as a basis for contending that the nonuse caused the plaintiff's partial loss of smell.[70] The trial judge disallowed the question.[71] On appeal from a judgment for the plaintiff, the defendant claimed error by asserting that the plaintiff was either negligent or had assumed the risk of injury because he failed to wear a safety helmet.[72] Although Minnesota did not have a

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63. 257 Md. 233, 262 A.2d 549 (1970).

64. Rogers v. Frush, 257 Md. 233, 233, 262 A.2d 549, 549 (1970).

65. *Id.* at 237-38, 262 A.2d at 551. The proffered testimony was that of a qualified neurosurgeon with expertise in the field of investigating automobile accidents. *Id.* at 237, 262 A.2d at 551. The surgeon was willing to testify that had the motorcycle driver worn a helmet, the chance of his sustaining the injuries would have been reduced by 50% and the chance of receiving a skull fracture would have been reduced by 90%. *Id.* at 238, 262 A.2d at 551.

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

67. *Id.* at 233, 262 A.2d at 549. On appeal, defendant argued contributory negligence, 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. *Id.* at 234, 262 A.2d at 551. In its response to this argument, the *Rogers* court relied on traditional tort doctrine that one is not under a duty to anticipate the negligent acts of another and that it is not every action on the part of a litigant that an opponent by way of "second guessing" or hindsight may successfully label as contributory negligence. *Id.* at 235, 262 A.2d at 552. The *Rogers* court ruled that the avoidable consequences theory was inapplicable because the doctrine comes into play only after the defendant has committed the wrongful act. *Id.* at 236, 262 A.2d at 554. Regarding the assumption of risk theory, the *Rogers* court refused to find that the plaintiff had voluntarily exposed himself to a known danger or consented to the defendant's negligence so as to relieve him of the duty to act with due care. *Id.* at 236, 262 A.2d at 554.

68. *Id.* at 233, 262 A.2d at 549.

69. 290 Minn. 495, 186 N.W.2d 182 (1971). The *Fox* case involved a collision between a helmetless motorcyclist and a motorist. Burgstahler v. Fox, 290 Minn. 495, 186 N.W.2d 182 (1971). The defendant motorist appealed from a judgment for the plaintiff, complaining that the lower court erred in its refusal to allow defendant to cross-examine plaintiff on plaintiff's failure to wear a helmet. *Id.*

70. Brief for Appellant at 3-5, Burgstahler v. Fox, 290 Minn. 495, 186 N.W.2d 182 (1971).

71. *Id.* at 3.

72. *Id.* The defendant in *Fox* asserted that the plaintiff had breached a statutory duty to wear a

mandatory helmet law in effect at the time of the accident, the defendant based the contributory negligence argument on a city ordinance that required helmet usage by motorcycle operators of rented machines.[73] Citing *Rogers* as authority, the *Fox* court rejected defendant's arguments and found the ordinance inapplicable because the plaintiff owned the motorcycle.[74]

The third helmet defense case is *Dean v. Holland*,[75] a 1973 New York appellate court decision. *Dean* arose out of a collision between a car and the minor operator of a minibike, a vehicle that New York law classified as a motorcycle.[76] New York had a mandatory helmet use statute in effect.[77] In discovery proceedings, defense counsel moved to depose plaintiff concerning his failure to wear a helmet, but the plaintiff refused to submit to questioning.[78] On defendant's motion to compel discovery, the appellate court held that the plaintiff was required to answer the questions at issue.[79]

In its opinion, the *Dean* court addressed two theories underlying the helmet defense — contributory negligence and the substantial factor test. On the theory of contributory negligence, the court noted the mandatory helmet use law in effect and stated that a party may be charged with negligence for the violation of the statute provided a causal relation exists between the failure to wear a helmet and the occurrence of the accident.[80] The court did not find that the violation of the statute caused or contributed to the collision.[81] The court continued, however, that the plaintiff's nonuse of a helmet could have been a substantial factor in causing his injuries and, therefore, a jury could find that the plaintiff could not recover for injuries he sustained by not wearing a helmet.[82]

helmet. Burgstahler v. Fox, 290 Minn. at 496, 186 N.W.2d at 183. The *Fox* court rejected this argument because Minnesota's mandatory helmet use statute was not in effect at the time of the accident and could not, therefore, provide a standard of conduct to which the plaintiff was required to adhere. *Id.* at 496, 186 N.W.2d at 183.

73. 290 Minn. at 496, 186 N.W.2d at 183.

74. *Id.* As in *Rogers*, the *Fox* court refused to consider the applicability of the Minnesota state helmet use law that had become effective before appeal but after the accident. *Id.*

75. 76 Misc. 2d 517, 350 N.Y.S.2d 859 (1973).

76. Dean v. Holland, 76 Misc. 2d 517, 517, 350 N.Y.S.2d 859, 859 (1973).

77. 1966 N.Y. Laws ch. 979 (codified as amended, at N.Y. VEH. & TRAF. LAW § 381 (McKinney 1970) (operators of vehicles classified as motorcycles were required to wear helmets)).

78. 76 Misc. 2d at 518-19, 350 N.Y.S.2d at 861-62. The defendant in *Dean* also sought to inquire of the minor plantiff if his parents had instructed him to wear a helmet. *Id.* at 519, 350 N.Y.S.2d at 862. The failure of the parents to instruct the child on helmet use would prevent them in their derivative suit from recovering damages based on loss of services or medical expenses. *Id.* at 519, 350 N.Y.S.2d at 862.

79. *Id.* at 518-19, 350 N.Y.S.2d at 861-62. The *Dean* court reasoned that plaintiff's answers to defendant's questions were necessary to determine if the minor plaintiff had acted in a reasonable and prudent manner expected of a child of plaintiff's age. *Id.*

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

81. *Id.* The *Dean* court stated that it was unable to perceive how a violation of the statute caused or contributed to the accident, or was a proximate cause of the collision. *Id.* at 519, 350 N.Y.S.2d at 861.

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

The major issue in *Halvorson v. Voeller*[83] was whether testimony on the plaintiff's nonuse of a motorcycle helmet was relevant to the issue of either liability or damages.[84] On the issue of liability, the *Halvorson* court reasoned that the use or nonuse of a helmet ordinarily cannot be the proximate cause[85] of an accident.[86] However, the court continued that nonuse of a helmet may be a contributing cause to the injuries sustained and, therefore, be relevant to the issue of damages.[87] The *Halvorson* court discussed two approaches that allow evidence of nonuse of a helmet on the issue of damages: the Restatement (Second) of Torts, section 465, comment c approach[88] and the doctrine of avoidable consequences, which is sometimes called the doctrine of mitigation of damages.[89]

The *Halvorson* court elected to follow these approaches[90] and concluded that the nonuse of a helmet may be viewed as negligent conduct that, if it is a substantial contributing factor to the harm that a plaintiff incurs, may be considered to mitigate a damage award even though the plaintiff's negligence was not a cause of the original accident or injury.[91]

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83. 336 N.W.2d 118 (N.D. 1983). *Halvorson* arose from a collision between a helmetless motorcyclist and a truck. Halvorson v. Voeller, 336 N.W.2d 118, 119 (N.D. 1983). The plaintiff motorcyclist sustained severe head injuries. *Id.* Prior to trial, defendant sought to introduce evidence that plaintiff's injuries would have been less severe had he been wearing a helmet. *Id.* The trial court disallowed this evidence and defendant raised this issue on appeal. *Id.*

84. *Id.* at 119. The trial court had refused the admission of testimony on the plaintiff's nonuse of a helmet and held that in the absence of a statutorily-created duty to wear a helmet, the court would not impose a common law duty to do the same. *Id.*

85. *See* PROSSER, *supra,* note 45, at 237. A cause is a necessary antecedent of an event; it precedes and brings about an effect or result. *Id.*

86. 336 N.W.2d at 119. The *Halvorson* court explained: "Ordinarily, evidence of nonuse of a helmet has no relevance to the *issue of liability* for causing an *accident;* that is, seldom, if ever, will the fact that a person did not wear a protective helmet contribute to the cause of an accident." *Id.* (emphasis in original).

87. 336 N.W.2d at 118-19 *See also* Note, *supra* note 10, at 243, 269 (helmet defense is gaining in stature).

88. 336 N.W.2d at 119-20. See *supra* notes 56-57 for the text of RESTATEMENT (SECOND) OF TORTS § 465 comment c.

89. 336 N.W.2d at 120-21. See *supra* notes 52-55 and accomplaying text for a discussion of the doctrine of avoidable consequences.

90. 336 N.W.2d at 121. North Dakota is presently one of two jurisdictions which considers the helmet defense for the awarding of damages. The other jurisdiction is New York. *See* Dean v. Holland, 76 Misc.2d 517, 350 N.Y.S.2d 859 (1973) (omission to wear a helmet may be relevant and material on the issue of injuries and damages).

91. 336 N.W.2d at 121. The *Halvorson* court's conclusion that nonuse of a helmet may, in certain instances, be viewed as negligent conduct is valid in light of the increased vulnerability of a motorcyclist as compared to the vulnerability of an occupant of a larger and an enclosed vehicle. Statistics show that (1) in those states that have repealed their helmet use laws, the fatal head injury rate increased as much as four times (REPORT,*supra* note 25, at V-6); (2) during the first three years, 1976-79, following the repeal of federal requirements, the number of cycles involved in fatal accidents rose over 26% (*see* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., UNITED STATES DEP'T OF TRANSP., DOT-HS-804-030, FACT BOOK: STATISTICAL INFORMATION ON HIGHWAY SAFETY at III(4)2 (June 1979); (3) the number of motorcycle fatalities per fatal accident is close to one, indicating that the one fatality in these accidents is almost always a cycle occupant (NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., UNITED STATES DEP'T OF TRANSP., DOT-HS- 804-832, FATAL ACCIDENT REPORTING SYSTEM, 1978 Annual Report (1979)); (4) 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 (REPORT, *supra* note 25, § V).

The *Halvorson* court observed that the doctrine of mitigation of damages is traditionally applied to the plaintiff's conduct following his injury.[92] By applying the doctrine to a situation in which the plaintiff's failure to minimize his injuries is allegedly due to his nonuse of a safety device, the plaintiff is effectively required to mitigate his injuries by his conduct that occurs before he is injured.[93] However, if damages are capable of reasonable apportionment to separate causes, the court noted that it should make no difference whether the plaintiff's negligence in aggravating his injuries preceded or succeeded the defendant's negligence.[94] Additionally, the imposition upon the plaintiff of a pre-accident obligation to anticipate a defendant's negligence may, in certain instances, be justifiable when compared with the likelihood of and the severity of an injury.[95]

To establish that the nonuse of a helmet is a substantial contributing factor to the plaintiff's injuries, the *Halvorson* court required competent testimony by a qualified expert.[96] Additionally, the court provided jury instructions[97] that first require a jury to consider the plaintiff's nonuse of a helmet on the basis of a reasonable person standard.[98] The court stated that if the jury finds that a reasonable person would have worn a helmet and that

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92. 336 N.W.2d at 120.

93. *Id.* The *Halvorson* court noted that a major criticism of considering a plaintiff's failure to use a safety device in mitigation of damages is that the omission of the device is an act that occurred before, and not after, the plaintiff sustained injury. *Id.* This allegedly deprives a plaintiff of the right to assume the due care of others toward him. *See, e.g.*, Amend v. Bell, 89 Wash.2d 124, 570 P.2d 138 (1977) (plaintiff did not have a duty to anticipate defendant's negligence and therefore, did not breach a duty by failing to wear seat belt); Lafferty v. Allstate Ins. Co., 425 So.2d 1147 (Fla. Dist. Ct. App. 1982) (in absence of a statutory duty, plaintiff is not under any duty to wear a seat belt).

94. 336 N.W.2d at 120 (citing W. PROESSER, THE LAW OF TORTS § 65, at 423-24 (4th ed. 1971).

95. 336 N.W.2d at 121. The *Halvorson* court drew heavily from the answer of a New York appellate court given in response to the argument that a plaintiff has an undeniable right to assume the due care of others toward him. Spier v. Barker, 35 N.Y.2d 444, 452, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 922 (1974). The *Spier* court reasoned that "[w]hen an automobile occupant may readily protect himself [by using a seat belt], at least partially, from the consequences of a collision, we think that the burden of buckling an available seat belt may . . . be found by the jury to be less than the likelihood of injury when multiplied by its accompanying severity." *Id.* at 452, 323 N.E.2d at 168, 363 N.Y.S.2d at 922.

96. 336 N.W.2d at 121. The Restatement (Second) of Torts addresses the causal relationship between the harm and the plaintiff's negligence and requires that evidence admitted under this theory be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation. RESTATEMENT (SECOND) OF TORTS § 465 comment c.

97. 336 N.W.2d at 121. The jury instructions provided by the *Halvorson* court state:

> If you find (1) it was unreasonable for the plaintiff to not wear a helmet, and (2) the plaintiff would not have received some or all of his injuries had he worn a helmet, then (3) the amount of damages awarded the plaintiff for the injuries he sustained must be reduced in proportion to the amount of injury he would have avoided by the use of a helmet. The burden of proof on both (1) and (2) rests with the defendant.

Id.

98. *Id.* The *Halvorson* court stressed that it did not mean to say that whenever satisfactory evidence is presented by the defendant to show that plaintiff's nonuse of a helmet contributed to his injuries the jury must reduce damages; rather, a jury must first decide if a reasonable person exercising ordinary care would have worn a helmet under the circumstances. *Id.*

competent evidence establishes a causal connection between the plaintiff's failure to wear a helmet and the injuries received, then the jury may reduce damages to the extent that a helmet would have decreased the plaintiff's injuries.[99] The reasonable person standard is especially important since the *Halvorson* holding imposes a judicially-created standard of care[100] on motorcyclists in the absence of a legislatively-created standard of care.[101]

Though afforded little attention within the opinion of the *Halvorson* court, a final basis upon which the court's holding rests is the doctrine of comparative negligence.[102] Since comparative negligence apportions damages according to the fault of each party, evidence such as that of helmet use or nonuse is relevant to the determination of total fault of all of the parties.[103] However, in those jurisdictions that employ the "hybrid" rule of comparative negligence,[104] which include North Dakota,[105] a court must decide whether the jury may consider helmet evidence in apportioning fault or whether it may consider such evidence solely to reduce damages.[106] The *Halvorson* decision permitted the introduction of a plaintiff motorcyclist's nonuse of a helmet as evidence to mitigate his damages.[107] In a footnote the court also provided a method of

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99. *Id.* The defendant has the burden of proving (1) that a reasonably prudent person would have worn a safety helmet and (2) that the plaintiff's failure to wear a helmet increased his injuries. *Id.*

100. *Id.* at 122. In its discussion of its judicially-created standard of care, the *Halvorson* court said that merely because the legislature has decided not to require motorcyclists over eighteen years of age to wear a helmet does not mean that these cyclists will never have a duty to wear helmets. *Id.* Further, the court noted: "[a] court may adopt as a standard of care the requirements of a legislative enactment designed to protect a specified class of persons [but] it never has been suggested that a standard of care may be inferred from a statute which does not require the use of safety devices by a certain segment of society." *Id.*

101. North Dakota's current helmet usage legislation (codified at N.D. CENT. CODE § 39-10.2-06 (1977)) requires only motorcycle operators under eighteen years of age to wear a helmet. For the text of § 39-10.2-06, see *supra* note 26.

102. 336 N.W.2d at 121 n.2. For the text of North Dakota's comparative negligence statute, see *supra* note 47.

103. Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465 (1953). The author stated that recoverable damages must be reduced in the proportion that the plaintiff's fault bears to the total fault of plaintiff and defendant. *Id.* at 482.

104. *See* Note, *supra* note 43, at 277. As used in this context, the "hybrid" rule is distinguished from "pure" comparative negligence. *Id.* at 277 n.21. The hybrid rule permits the plaintiff to recover some damages as long as his negligence does not exceed the defendant's. *Id.* Once the plaintiff's negligence exceeds the defendant's, he is totally barred from recovery even though the defendant may still be partially negligent in harming the plaintiff. *Id.*

105. See *supra* note 47 for the text of North Dakota's comparative negligence statute. The statute allows for recovery by the plaintiff as long as his negligence is "not as great as" the negligence of the defendant. N.D. CENT. CODE § 9-10-07 (1975).

106. Note, *supra* note 43, at 277. If, under a hybrid comparative negligence doctrine, evidence of use or nonuse of a safety device is applied to the issue of fault, a plaintiff will be barred from recovery if his fault for the injury equals or exceeds the fault of the defendant for the accident; but if such evidence is applied to the issue of damages, the jury will determine the defendant's liability for the injury and then reduce those damages by the percentage of injury attributable to the plaintiff's nonuse. *Id.*

107. 336 N.W.2d at 123. The *Halvorson* court concluded that helmet evidence is relevant to the issue of damages and explained:

calculating the mitigation of damages.[108]

The *Halvorson* decision may result in increased helmet usage by motorcyclists within North Dakota. It effectively charges motorcyclists with a responsibility to provide for their safety by using the reasonable and readily available means of helmets.[109] It also opens the way for the seat belt defense,[110] the predecessor of the motorcycle helmet defense, to take a place in the line of defenses available to a defendant to mitigate the plaintiff's damage award. Thus, plaintiffs who fail to wear seat belts will have their damage awards reduced by the percentage of their injury which is attributable to the nonuse of seat belts.[111]

Evidence of a plaintiff's failure to use other safety devices,[112] unless otherwise expressly provided for by statute,[113] will be relied upon by defense counsel to place some of the liability for plaintiff's injuries upon the plaintiff himself.

The court in *Halvorson* placed safeguards on a potentially

> A reasoned application of well-recognized principles of tort law easily leads to the conclusion that a jury should be permitted to consider whether or not plaintiff's failure to wear a helmet may have been a substantial factor in bringing about his harm, and whether or not in the exercise of ordinary care a person would have worn a helmet to avoid or mitigate any injuries he might sustain in an accident.

Id.

108. *Id.* at 121-22 n.2. The *Halvorson* court provided the following example to explain how mitigation of damages for contributing to the cause of an injury should operate under North Dakota's comparative negligence statute:

> Assume: X, driving a car, and Y, driving a motorcycle, get in an accident. Y is not wearing a helmet. The jury finds X is 60 percent liable for causing the accident, making Y, the motorcyclist, 40 percent liable for causing the *accident.* The jury also finds Y would have avoided 60 percent of his injuries if he had worn a helmet; therefore, X is 40 percent liable for causing Y's *injuries.* Y proves $100,000 in damages.
>
> On the basis of these findings, the $100,000 award should be reduced by 40 percent, which accounts for Y's contributing to the cause of the accident. Hence, the award is diminished to $60,000.
>
> The $60,000 should now be reduced to the extent that Y's injuries would have been less had he worn a helmet, i.e., 60 percent. This adjustment leaves a total award of $24,000.

Id. (emphasis in original).

109. See *supra* note 91 for statistical evidence in support of a judicial decision to charge motorcyclists with a responsibility to take reasonable precautions for their safety.

110. *See* Note, *supra* note 10, at 241 n.53. The seat belt defense seeks to impose at least partial responsibility for plaintiff's injuries on the plaintiff who, at the time of the accident, was not wearing his seat belt. *Id.* The defense's origin has been traced to Stockinger v. Dunisch, No. ____ (Cir. Ct. Sheboygan Co., Wis. 1964). *Id.*

111. See *supra* note 41 for a partial listing of those jurisdictions allowing evidence of nonuse of a seat belt to mitigate plaintiff's damages.

112. *See, e.g.*, Garrett v. Desa Indust., Inc., 705 F.2d 721 (4th Cir. 1983) (stud driver operator's failure to wear safety goggles may constitute contributory negligence and it is a question for the jury).

113. *See, e.g.*, N.D. CENT. CODE § 39-21-41.2 (Supp. 1983). Section 39-21-41.2 mandates use of child restraint devices for children under two years of age riding in a passenger car; provides for a fine not to exceed $20 for violation of this requirement; and provides that evidence of violation of this statute is not, in itself, negligence, and such evidence will not be admissible in any proceeding other than the one charging a violation of the statute. *Id.*

broad holding[114] by (1) requiring expert testimony on the effectiveness of helmet use under given circumstances and (2) instructing a jury that it must first find that a plaintiff acted unreasonably and without due care by not wearing a helmet before it may go on to calculate the effect of nonuse of a helmet on the plaintiff's damages.[115] Requiring expert testimony on the defendant's behalf will inevitably lead to the need for expert rebuttal on plaintiff's behalf. Use of experts by both sides will undoubtedly lead to discrepancies of varying degrees between the experts' testimonies. This is the reason numerous courts have disallowed evidence of nonuse of safety devices, noting that such discrepancies among experts' testimonies will cause the calculation of damages to be conjectural and speculative.[116] However, many courts hold otherwise, believing that the risk of speculative damage awards is not so great as undermining the theory that a defendant is liable only for those damages to which he contributed.[117] But for those jurisdictions that have adopted comparative negligence, the basic premise of the doctrine — to compare the total fault of a party to the total fault of the other party — mandates that evidence of nonuse of safety devices be admissible to mitigate damages.[118] Finally, the *Halvorson* court's requirement to review the evidence in light of a reasonable person standard is intended to distill the experts' testimonies and render a damage award that reflects the total fault of each party involved.

CYNTHIA WAGNER GOULET

114. *See* Fischer v. Moore, 183 Colo. 392, 517 P.2d 458 (1973). The *Fischer* court did not permit seat belt evidence because, in part, it feared abuse of such evidence. *Id.* at 395, 517 P.2d at 459. The court said: "If we were to hold otherwise, the person who was driving a Volkswagen, and not a Mack truck, could be said to be more vulnerable to injury and, therefore, guilty of contributing to his own injury as a matter of law." *Id.*

115. 336 N.W.2d at 121. See *supra* note 97 for the text of the *Halvorson* jury instructions.

116. See *supra* note 54 for jurisdictions that have disallowed evidence on nonuse of a safety device to mitigate damages.

117. See *supra* note 41 for a list of jurisdictions that have allowed evidence on nonuse of a safety device to mitigate damages.

118. See *supra* notes 59-62 and 102-08 and accompanying text for an explanation of comparative negligence and its impact on nonuse of safety devices to mitigate damages.