



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Added To File: 06/17/2003 (Per: ARG)



☞ The 2003 drafting file for LRB 03-1124/3

has been copied/added to the 2003 drafting file for

LRB 03-2839

☞ The attached 2003 draft was incorporated into the new 2003 draft listed above. For research purposes, this cover sheet and the attached drafting file were copied on yellow paper (darkened - auto centered - reduced to 90%), and added, as a appendix, to the new 2003 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

☞ This cover sheet was added to rear of the original 2003 drafting file. The drafting file was then returned, intact, to its folder and filed.

2003 DRAFTING REQUEST

Bill

Received: 12/12/2002

Received By: tfast

Wanted: Soon

Identical to LRB:

For: David Zien (608) 266-7511

By/Representing: Pete Hanson (aide)

This file may be shown to any legislator: NO

Drafter: tfast

May Contact:

Addl. Drafters: agary
rnelson2

Subject: Transportation - motor vehicles

Extra Copies: PJH, RNK, MGG

Submit via email: YES

Requester's email: Sen.Zien@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Liability and motorcycle helmet use

Instructions:

Make Wisconsin Supreme Court decision in Stehlik (re "helmet defense" in ATV liability cases) nonapplicable to motorcycle helmets (base on Minnesota bill)

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	tfast 03/02/2003	wjackson 03/03/2003		_____			
/1	agary 05/09/2003	wjackson 05/09/2003	rschluet 03/03/2003	_____	amentkow 03/03/2003		

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/3			chaskett 06/03/2003	_____ _____ _____	mbarman 06/03/2003	sbasford 06/12/2003 sbasford 06/12/2003	

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[Handwritten signatures and notes]
 1/2 cph 6/3
 5-9-3
 3/6/03
 6/3
 CPH

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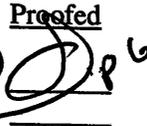
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FE Sent For:

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This document can be made available in alternative formats upon request.

State of Minnesota
HOUSE OF REPRESENTATIVES

EIGHTY FIRST
SESSION

HOUSE FILE NO. 858

February 18, 1999

Authored by Workman, Swigman, Marks, Kalis, Broecker and others
Read First Time and Referred to the Committee on TRANSPORTATION POLICY

A bill for an act

1
2 relating to traffic regulations; prohibiting admission
3 of use of protective headgear by motorcycle operators
4 or passengers age 18 or older in litigation involving
5 damages arising from use or operation of a motor
6 vehicle; amending Minnesota Statutes 1998, section
7 169.974, by adding a subdivision; repealing Minnesota
8 Statutes 1998, section 169.974, subdivision 6.

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

10 Section 1. Minnesota Statutes 1998, section 169.974, is
11 amended by adding a subdivision to read:

12 Subd. 8. [MOTORCYCLE HELMET USE; ADMISSIBILITY INTO
13 EVIDENCE.] (a) Proof of the use or failure to use protective
14 headgear by a motorcycle operator or passenger age 18 or older
15 is not admissible in evidence in any litigation involving
16 personal injuries or property damage resulting from the use or
17 operation of any motor vehicle.

18 (b) Paragraph (a) does not affect the right of a person to
19 bring an action for damages arising out of an incident that
20 involves protective headgear that was allegedly defectively
21 designed or manufactured. Paragraph (a) does not prohibit the
22 introduction of evidence pertaining to the use of the protective
23 headgear in such an action.

24 Sec. 2. [REPEALER.]

25 Minnesota Statutes 1998, section 169.974, subdivision 6, is
26 repealed.

27 Sec. 3. [EFFECTIVE DATE.]

Section 3

Possible
Fix for
"Stehlik."

APPENDIX
Repealed Minnesota Statutes for 99-1805

169.974 MOTORCYCLE, MOTOR SCOOTER AND MOTOR BIKE.

Subd. 6. Negligence; damages without protective headgear. 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 that complied with standards established by the commissioner of public safety 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 that complied with standards established by the commissioner of public safety. 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 that complied with standards established by the commissioner of public safety.

Source: Legal > /... /> MN - Minnesota Statutes, 1998 ①

Terms: "169.974" (Edit Search)

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Minn. Stat. § 169.974

MINNESOTA STATUTES 1998

*** ARCHIVE DATA ***

*** THIS SECTION IS CURRENT THROUGH THE 1998 LEGISLATIVE SESSIONS ***

Transportation
CHAPTER 169 TRAFFIC REGULATIONS
MISCELLANEOUS PROVISIONS

Minn. Stat. § 169.974 (1998)

169.974 Motorcycle, motor scooter and motor bike

Subdivision 1. Definition. Motorcycles as used herein shall mean the vehicles defined in section 169.01, subdivision 4.

Subd. 2. License requirements. No person shall operate a motorcycle on any street or highway without having a valid standard driver's license with a two-wheeled vehicle endorsement as provided by law. No such two-wheeled vehicle endorsement shall be issued unless the person applying therefor has in possession a valid two-wheeled vehicle instruction permit as provided herein, has passed a written examination and road test administered by the department of public safety for such endorsement, and, in the case of applicants under 18 years of age, shall present a certificate or other evidence of having successfully completed an approved two-wheeled vehicle driver's safety course in this or another state, in accordance with rules promulgated by the state board of education for courses offered through the public schools, or rules promulgated by the commissioner of public safety for courses offered by a private or commercial school or institute. The commissioner of public safety may waive the road test for any applicant on determining that the applicant possesses a valid license to operate a two-wheeled vehicle issued by a jurisdiction that requires a comparable road test for license issuance. A two-wheeled vehicle instruction permit shall be issued to any person over 16 years of age, who is in possession of a valid driver's license, who is enrolled in an approved two-wheeled vehicle driver's safety course, and who has passed a written examination for such permit and has paid such fee as the commissioner of public safety shall prescribe. A two-wheeled vehicle instruction permit shall be effective for one year, and may be renewed under rules to be prescribed by the commissioner of public safety.

No person who is operating by virtue of a two-wheeled vehicle instruction permit shall:

- (a) carry any passengers on the streets and highways of this state on the motorcycle which the person is operating;
- (b) drive the motorcycle at nighttime;
- (c) drive the motorcycle on any highway marked by the commissioner as an interstate highway pursuant to title 23 of the United States Code; or
- (d) drive the motorcycle without wearing protective headgear that complies with standards

established by the commissioner of public safety.

Notwithstanding the provisions of this subdivision, the commissioner of public safety may, however, issue a special motorcycle permit, restricted or qualified in such manner as the commissioner of public safety shall deem proper, to any person demonstrating a need therefor and unable to qualify for a standard driver's license.

Subd. 3. Vehicle equipment. (a) No person shall operate any motorcycle equipped with handlebars if any part of such handlebars extend above the shoulders of the operator while seated with both feet on the ground.

(b) Any motorcycle with a seat designed or suited for use by a passenger shall be equipped with foot rests for the passenger. No person shall operate any motorcycle on the streets and highways after January 1, 1971, unless such motorcycle is equipped with at least one rear view mirror so attached and adjusted as to reflect to the operator a view of the roadway for a distance of at least 200 feet to the rear of the motorcycle and is equipped with not less than one horn which shall be audible at a distance of at least 200 feet under normal conditions.

(c) All other applicable provisions of this chapter pertaining to motorcycle and other motor vehicle equipment shall apply to motorcycles, except those which by their nature have no application.

Subd. 4. Equipment for operator and passenger. (a) No person under the age of 18 shall operate or ride a motorcycle on the streets and highways of this state without wearing protective headgear that complies with standards established by the commissioner of public safety; and no person shall operate a motorcycle without wearing an eye-protective device.

(b) The provisions of this subdivision shall not apply to persons during their participation in a parade for which parade a permit or other official authorization has been granted by a local governing body or other governmental authority or to persons riding within an enclosed cab.

Subd. 5. Driving rules. (a) An operator of a motorcycle shall ride only upon a permanent and regular seat which is attached to the vehicle for that purpose. No other person shall ride on a motorcycle; except that passengers may ride upon a permanent and regular operator's seat if designed for two persons, or upon additional seats attached to the vehicle to the rear of the operator's seat, or in a sidecar attached to the vehicle; provided, however, that the operator of a motorcycle shall not carry passengers in a number in excess of the designed capacity of the motorcycle or sidecar attached to it. No passenger shall be carried in a position that will interfere with the safe operation of the motorcycle or the view of the operator.

(b) No person shall ride upon a motorcycle as a passenger unless, when sitting astride the seat, the person can reach the foot rests with both feet.

(c) No person, except passengers of sidecars or drivers and passengers of three-wheeled motorcycles, shall operate or ride upon a motorcycle except while sitting astride the seat, facing forward, with one leg on either side of the motorcycle.

(d) No person shall operate a motorcycle while carrying animals, packages, bundles, or other cargo which prevent the person from keeping both hands on the handlebars.

(e) No person shall operate a motorcycle between lanes of moving or stationary vehicles headed in the same direction, nor shall any person drive a motorcycle abreast of or overtake or pass another vehicle within the same traffic lane, except that motorcycles may, with the consent of both drivers, be operated not more than two abreast in a single traffic lane.

(f) Motor vehicles including motorcycles are entitled to the full use of a traffic lane and no

motor vehicle may be driven or operated in a manner so as to deprive a motorcycle of the full use of a traffic lane.

(g) A person operating a motorcycle upon a roadway must be granted the rights and is subject to the duties applicable to a motor vehicle as provided by law, except as to those provisions which by their nature can have no application.

(h) Clause (e) of this subdivision does not apply to police officers in the performance of their official duties.

(i) No person shall operate a motorcycle on a street or highway unless the headlight or headlights are lighted at all times the motorcycle is so operated.

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Subd. 6. Negligence; damages without protective headgear. 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 that complied with standards established by the commissioner of public safety 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 that complied with standards established by the commissioner of public safety. 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 that complied with standards established by the commissioner of public safety.

Subd. 7. Noise limits. After December 31, 1978, noise rules adopted by the pollution control agency for motor vehicles pursuant to section 169.693 shall also apply to motorcycles.

*added
Sections*

HISTORY:

1967 c 875 s 1-5; 1969 c 1123 s 1-3; 1969 c 1129 art 1 s 18; 1971 c 226 s 1; 1971 c 491 s 35; 1974 c 133 s 1; 1975 c 29 s 3-5; 1976 c 295 s 1; 1977 c 17 s 1-4; 1977 c 134 s 1; 1981 c 357 s 63; 1982 c 548 art 4 s 13; 1983 c 216 art 1 s 29,30; 1983 c 345 s 8; 1984 c 549 s 32,33; 1985 c 248 s 70; 1986 c 444; 1995 c 40 s 1; 1997 c 159 art 2 s 31

Source: [Legal > / . . . / > MN - Minnesota Statutes, 1998](#) ①

Terms: "169.974" ([Edit Search](#))

View: Full

Date/Time: Wednesday, September 25, 2002 - 12:01 PM EDT

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Source: [Legal > / . . . / > MN - Minnesota Statutes, 2000](#) ⓘ
TOC: *temporarily unavailable*
Terms: "169.974" ([Edit Search](#))

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Minn. Stat. § 169.974

MINNESOTA STATUTES 2000

*** ARCHIVE MATERIAL ***

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2000 LEGISLATION ***

Transportation
CHAPTER 169 TRAFFIC REGULATIONS
MISCELLANEOUS PROVISIONS

Minn. Stat. § 169.974 (2000)

169.974 Motorcycle, motor scooter, motor bike

Subdivision 1. Definition. Motorcycles as used herein shall mean the vehicles defined in section 169.01, subdivision 4.

Subd. 2. License endorsement and permit requirements. (a) No person shall operate a motorcycle on any street or highway without having a valid standard driver's license with a two-wheeled vehicle endorsement as provided by law. The commissioner of public safety shall issue a two-wheeled vehicle endorsement only if the applicant (1) has in possession a valid two-wheeled vehicle instruction permit as provided in paragraph (b), (2) has passed a written examination and road test administered by the department of public safety for the endorsement, and (3) in the case of applicants under 18 years of age, presents a certificate or other evidence of having successfully completed an approved two-wheeled vehicle driver's safety course in this or another state, in accordance with rules adopted by the commissioner of public safety for courses offered by a public, private, or commercial school or institute. The commissioner of public safety may waive the road test for any applicant on determining that the applicant possesses a valid license to operate a two-wheeled vehicle issued by a jurisdiction that requires a comparable road test for license issuance.

(b) The commissioner of public safety shall issue a two-wheeled vehicle instruction permit to any person over 16 years of age who (1) is in possession of a valid driver's license, (2) is enrolled in an approved two-wheeled vehicle driver's safety course, and (3) has passed a written examination for the permit and paid a fee prescribed by the commissioner of public safety. A two-wheeled vehicle instruction permit is effective for one year and may be renewed under rules prescribed by the commissioner of public safety.

(c) No person who is operating by virtue of a two-wheeled vehicle instruction permit shall:

(1) carry any passengers on the streets and highways of this state on the motorcycle while the person is operating the motorcycle;

(2) drive the motorcycle at night;

(3) drive the motorcycle on any highway marked as an interstate highway pursuant to title 23 of the United States Code; or

(4) drive the motorcycle without wearing protective headgear that complies with standards established by the commissioner of public safety.

(d) Notwithstanding paragraph (a), (b), or (c), the commissioner of public safety may issue a special motorcycle permit, restricted or qualified as the commissioner of public safety deems proper, to any person demonstrating a need for the permit and unable to qualify for a standard driver's license.

Subd. 3. Vehicle equipment. (a) No person shall operate any motorcycle equipped with handlebars if any part of such handlebars extend above the shoulders of the operator while seated with both feet on the ground.

(b) Any motorcycle with a seat designed or suited for use by a passenger shall be equipped with foot rests for the passenger. No person shall operate any motorcycle on the streets and highways after January 1, 1971, unless such motorcycle is equipped with at least one rear view mirror so attached and adjusted as to reflect to the operator a view of the roadway for a distance of at least 200 feet to the rear of the motorcycle and is equipped with not less than one horn which shall be audible at a distance of at least 200 feet under normal conditions.

(c) All other applicable provisions of this chapter pertaining to motorcycle and other motor vehicle equipment shall apply to motorcycles, except those which by their nature have no application.

Subd. 4. Equipment for operator and passenger. (a) No person under the age of 18 shall operate or ride a motorcycle on the streets and highways of this state without wearing protective headgear that complies with standards established by the commissioner of public safety; and no person shall operate a motorcycle without wearing an eye-protective device.

(b) The provisions of this subdivision shall not apply to persons during their participation in a parade for which parade a permit or other official authorization has been granted by a local governing body or other governmental authority or to persons riding within an enclosed cab.

Subd. 5. Driving rules. (a) An operator of a motorcycle shall ride only upon a permanent and regular seat which is attached to the vehicle for that purpose. No other person shall ride on a motorcycle; except that passengers may ride upon a permanent and regular operator's seat if designed for two persons, or upon additional seats attached to the vehicle to the rear of the operator's seat, or in a sidecar attached to the vehicle; provided, however, that the operator of a motorcycle shall not carry passengers in a number in excess of the designed capacity of the motorcycle or sidecar attached to it. No passenger shall be carried in a position that will interfere with the safe operation of the motorcycle or the view of the operator.

(b) No person shall ride upon a motorcycle as a passenger unless, when sitting astride the seat, the person can reach the foot rests with both feet.

(c) No person, except passengers of sidecars or drivers and passengers of three-wheeled motorcycles, shall operate or ride upon a motorcycle except while sitting astride the seat, facing forward, with one leg on either side of the motorcycle.

(d) No person shall operate a motorcycle while carrying animals, packages, bundles, or other cargo which prevent the person from keeping both hands on the handlebars.

(e) No person shall operate a motorcycle between lanes of moving or stationary vehicles headed in the same direction, nor shall any person drive a motorcycle abreast of or overtake or pass another vehicle within the same traffic lane, except that motorcycles may, with the consent of both drivers, be operated not more than two abreast in a single traffic lane.

(f) Motor vehicles including motorcycles are entitled to the full use of a traffic lane and no motor vehicle may be driven or operated in a manner so as to deprive a motorcycle of the full use of a traffic lane.

(g) A person operating a motorcycle upon a roadway must be granted the rights and is subject to the duties applicable to a motor vehicle as provided by law, except as to those provisions which by their nature can have no application.

(h) Paragraph (e) of this subdivision does not apply to police officers in the performance of their official duties.

(i) No person shall operate a motorcycle on a street or highway unless the headlight or headlights are lighted at all times the motorcycle is so operated.

Subd. 6. Repealed, 1999 c 230 s 46

Subd. 7. Noise limits. After December 31, 1978, noise rules adopted by the pollution control agency for motor vehicles pursuant to section 169.693 shall also apply to motorcycles.

HISTORY:

HISTORY: 1967 c 875 s 1-5; 1969 c 1123 s 1-3; 1969 c 1129 art 1 s 18; 1971 c 226 s 1; 1971 c 491 s 35; 1974 c 133 s 1; 1975 c 29 s 3-5; 1976 c 295 s 1; 1977 c 17 s 1-4; 1977 c 134 s 1; 1981 c 357 s 63; 1982 c 548 art 4 s 13; 1983 c 216 art 1 s 29,30; 1983 c 345 s 8; 1984 c 549 s 32,33; 1985 c 248 s 70; 1986 c 444; 1995 c 40 s 1; 1997 c 159 art 2 s 31; 1998 c 398 art 5 s 55; 2000 c 489 art 6 s 30

Source: [Legal > / . . . / > MN - Minnesota Statutes, 2000](#) ⓘ

TOC: [temporarily unavailable](#)

Terms: ["169.974"](#) ([Edit Search](#))

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Date/Time: Wednesday, September 25, 2002 - 11:59 AM EDT

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2002 WI 73

Supreme Court of Wisconsin

Case No.: 99-3326

Complete Title:

Charles Stehlik and Barbara Stehlik,

Plaintiffs-Appellants,

Kimberly Clark Corporation and Medicare

Part A and Part B,

Involuntary-Plaintiffs,

v.

Paul Rhoads, Jill Rhoads, American Standard Insurance Company of Wisconsin and Wilson Mutual Insurance Company,

Defendants-Respondents.

ON CERTIFICATION FROM THE COURT OF APPEALS

Opinion Filed: June 26, 2002

Submitted on Briefs:

Oral Argument: September 17, 2001

Source of Appeal:

Court: Circuit
 County: Washington
 Judge: Annette K. Ziegler

Justices:

Concurred: ABRAHAMSON, C.J., concurs (opinion filed).

Dissented: CROOKS, J., dissents (opinion filed).

Not

Participating:

Attorneys:

For the plaintiffs-appellants there were briefs by Douglas B. Keberle and Keberle & Patrykus LLP, West Bend, and Owen Thomas Armstrong and Quarles & Brady LLP, Milwaukee, and oral argument by Douglas B. Keberle and Owen Thomas Armstrong, Jr.

For the defendants-respondents, Paul and Jill Rhoads and American Standard Insurance Company of Wisconsin, there was a brief by John U. Schmid, Laurie E. Meyer, Paul F. Graves and Borgelt, Powell, Peterson & Frauen, S.C., Milwaukee, and oral argument by Laurie E. Meyer.

For the defendants-respondents, Paul and Jill Rhoads and Wilson Mutual Insurance Company, there was a brief by Joseph J. Voelkner, James O. Conway and Olson, Kloet, Gunderson & Conway, Sheboygan, and oral argument by James O. Conway.

An amicus curiae brief was filed by Werner Erich Scherr and Peterson, Johnson & Murray, S.C., Milwaukee, on behalf of Civil Trial Counsel of Wisconsin.

An amicus curiae brief was filed by Lynn R. Laufenberg and Laufenberg Law Offices, S.C., Milwaukee, on behalf of the Wisconsin Academy of Trial Lawyers.

2002 WI 73

notice

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 99-3326

(L.C. 97 CV 237)

No.

STATE OF WISCONSIN

:

Charles Stehlik and Barbara Stehlik,

Plaintiffs-Appellants,

Kimberly Clark Corporation and Medicare

Part A and Part B,

IN
SUPREME COURT

FILED

Involuntary-Plaintiffs,

JUN 26, 2002

v.

Cornelia G. Clark

Paul Rhoads, Jill Rhoads, American

Clerk of Supreme
Court

Standard Insurance Company of Wisconsin

and Wilson Mutual Insurance Company,

Defendants-Respondents.

APPEAL from a judgment of the Circuit Court for Washington County, Annette K. Ziegler, Circuit Court Judge. *Reversed and cause remanded.*

¶1. DIANE S. SYKES, J. This case involves an all-terrain vehicle (ATV) accident and presents the issue of the availability and effect of the so-called "helmet defense" in Wisconsin. More particularly, the case raises two central questions: 1) is the "helmet defense" governed by the same principles as the "seat belt defense," and if so, should those principles be modified for purposes of the helmet defense; and 2) can an ATV owner be liable for failing to require adult users of the ATV to wear a safety helmet?

¶2. Charles Stehlik sustained serious head injuries in an ATV rollover accident. Paul and Jill Rhoads owned the ATV, and Stehlik was operating it with their permission at a party at their home. Although safety helmets were available, Stehlik was not wearing one at the time of the accident. Stehlik sued the Rhoads for negligence and negligent entrustment. He stipulated, however, that had he "been wearing a safety helmet at the time of his accident he would not have sustained any serious head injury."

¶3. The special verdict contained separate questions about the parties' respective causal negligence regarding the accident and regarding Stehlik's failure to wear a helmet. The jury concluded that both the Rhoads and Stehlik were negligent, in both respects, and separately apportioned the accident negligence (70 percent/30 percent) and the "helmet negligence" (60 percent/40 percent) between them. The jury also concluded that 90 percent of Stehlik's injuries were attributable to his failure to wear a helmet.

¶4. On motions after verdict, the circuit court struck the special verdict questions regarding the Rhoads' negligence for Stehlik's failure to wear a safety helmet, and limited Stehlik's recovery to the damages attributable to the Rhoads' negligence in causing the accident. That is, the circuit court reduced Stehlik's recovery by his 30 percent accident-causing contributory negligence, and by a

further 90 percent--the percentage of his injuries the jury allocated to the failure to wear a helmet. Stehlik appealed, and the court of appeals certified the case to us pursuant to Wis. Stat §809.61 (1997-98).¹

¶5. We conclude that the issue of a plaintiff's negligent failure to wear a safety helmet while operating an ATV is properly governed by the principles applicable to a plaintiff's negligent failure to wear a seat belt established in Foley v. City of West Allis, 113 Wis.2d475, 490, 335 N.W.2d824, 831 (1983). Foley separated the consideration of seat belt negligence from accident negligence and adopted a "second collision" methodology, adapted from successive tort and enhanced injury theories, for the treatment of seat belt negligence.

¶6. Unfortunately, however, Foley's "second collision" analysis has had the consequence of entirely removing seat belt negligence (or here, helmet negligence) from the negligence apportionment equation, because it requires the jury to allocate damages, not negligence, when it considers the issue of the plaintiff's seat belt/helmet negligence. In this context, this approach is inconsistent with a liability system grounded upon the idea of comparative responsibility or fault. Accordingly, we now modify the Foley approach for purposes of the helmet defense.

¶7. Separate consideration of accident negligence and helmet negligence pursuant to Foley remains the rule. Helmet negligence is a limitation on recoverable damages, not a potential bar to recovery under the comparative negligence statute, Wis. Stat. §895.045. This aspect of Foley remains sound and is applicable here.

¶8. However, for purposes of the helmet defense, we modify Foley's "second collision" construct, at least to the extent that it calls for an allocation of damages rather than an apportionment of negligence on the issue of a plaintiff's helmet negligence. The jury in a helmet defense case should be asked to compare the plaintiff's helmet negligence as against the total combined negligence of the defendants, rather than treating the comparison as an allocation or division of injuries or damages, as in a successive tort or enhanced injury case.

¶9. Finally, we conclude that for reasons of public policy, an ATV owner cannot be held liable for failing to require adult users of the ATV to wear an available helmet. The jury in this case should not have been asked to determine whether the Rhoads were negligent in failing to require Stehlik to wear a safety helmet, or to engage in a separate comparison of helmet negligence as between Stehlik and the Rhoads. The circuit court properly struck those questions from the jury verdict in this case.

¶10. Because the verdict in this case was based upon Foley, which we have now modified for purposes of the helmet defense, we reverse and remand for a new trial on the issue of liability only.

I

¶11. On September 30, 1994, Paul and Jill Rhoads took delivery of a new ATV. Paul Rhoads signed a warranty registration that contained warnings of the various dangers associated with ATVs, including operating the vehicle with passengers, operating without a safety helmet and other protective gear, operating without qualified ATV training, operating under the influence of alcohol, operating on an incline, and allowing others to operate the ATV without having read the owner's manual or received training. Warnings of some of these dangers were also posted on stickers over the front wheel guards, the back wheel guards, the rear bumper, and on the back of the seat of the ATV.

¶12. The next day, the Rhoads had a party at their home. They permitted their guests to operate the ATV after dark, on an unlit trail on a hill, with passengers, without instructions, without wearing available safety helmets, and after serving them alcoholic beverages.

¶13. Charles Stehlik, a guest who had been drinking alcohol both prior to and during the Rhoads' party,² decided to take the ATV for a ride. Stehlik was an over-the-road truck driver and part-time law enforcement officer for the Washington County Sheriff's Department and the Slinger Police Department. In addition to his employment-related driving experience, Stehlik had racing experience as a modified stock car racer and also drove motorcycles and mopeds. The parties stipulated that the Rhoads owned safety helmets, and the jury found that a helmet was in fact available for Stehlik's use. Nevertheless, Stehlik did not wear a helmet while driving the Rhoads' ATV.

¶14. Initially Stehlik operated the ATV alone, but later gave several passengers a ride, including, at the time of the accident, a four-year-old child.³ With Stehlik driving and the child aboard sitting in front of him, the ATV rolled over on the side of a hill. Stehlik struck his head against a concrete wall and sustained serious head injuries.

¶15. Stehlik sued the Rhoads. Prior to trial, the parties entered into the following stipulation: "The parties have stipulated that had Mr. Stehlik been wearing a safety helmet at the time of his accident he would not have sustained any serious head injury. The parties have also stipulated that Paul and Jill Rhoads owned such safety helmets."

¶16. The jury found both the Rhoads and Stehlik causally negligent with respect to the accident. The jury apportioned 70 percent of the accident negligence to the Rhoads and 30 percent to Stehlik. The jury also determined that a safety helmet was available for Stehlik's use, and that both the Rhoads and Stehlik were negligent with respect to Stehlik's failure to wear a helmet. The jury apportioned 60 percent of this "helmet negligence" to the Rhoads and 40 percent to Stehlik. The jury determined that 90 percent of Stehlik's injuries were attributable to his failure to wear a helmet. The jury fixed Stehlik's damages at \$853,277.⁴

¶17. On motions after verdict, the Washington County Circuit Court, the Honorable Annette K. Ziegler, concluded that the helmet negligence was passive negligence not subject to a comparative negligence analysis, and so the special verdict questions pertaining to the Rhoads' negligence regarding Stehlik's failure to wear a safety helmet should not have been submitted to the jury. The court struck those questions from the special verdict and reduced Stehlik's damages by 90 percent (the amount attributable to his failure to wear a helmet), and by a further 30 percent (the amount of his contributory negligence in causing the accident), resulting in an ultimate damages award of \$54,198. Stehlik appealed, and the court of appeals certified the case to us.

II

¶18. We review the circuit court's decision regarding the postverdict motions de novo because it presents a question of law. See Danner v. Auto-Owners Insurance, 2001 WI 90, ¶41, 245 Wis.2d49, 65, 629 N.W.2d159, 168. The Rhoads moved, pursuant to Wis. Stat. §805.14(5), for an order striking the special verdict questions regarding their liability for helmet negligence, although they did not contend that the evidence was insufficient to sustain the answers. See Wis. Stat. §805.14(5)(c). Rather, they argued that as a matter of law, they could not be liable for the helmet negligence of another. Therefore, while the postverdict motions were not styled as motions for judgment notwithstanding verdict (JNOV), the de novo standard of review, applicable to decisions on JNOV motions, applies here. See Herro v. DNR, 67 Wis. 2d 407, 413, 227 N.W.2d 456 (1975) ("While not challenging the sufficiency of the evidence to support the facts found in the verdict, [a JNOV motion] may be used to challenge whether the facts found in the verdict are [legally] sufficient to permit recovery.").

III

¶19. This case was submitted to the jury on negligence and negligent entrustment theories.⁵ We note initially that the jury was improperly instructed on the negligent entrustment theory of liability. The

circuit court used the pattern jury instruction applicable to negligent entrustment cases under §308 of the Restatement, which was adopted by this court in Bankert v. Threshermen's Mutual Ins. Co., 110 Wis. 2d 469, 476, 329 N.W.2d 150 (1983). See Wis JI--Civil 1014; Restatement (Second) of Torts §308 (1965). The court of appeals has held, however, that §308 is not applicable to self-inflicted injuries such as Stehlik's. See Erickson v. Prudential Ins. Co., 166 Wis. 2d 82, 95, 479 N.W. 2d 552 (Ct. App. 1991).

¶20. Section 308 of the Restatement (Second) of Torts provides:

§308 Permitting Improper Persons to Use Things or Engage in Activities

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) of Torts §308 (emphasis added). In Erickson, the court of appeals held that §308, by its terms, applies only when the person who is negligently entrusted with an item or activity injures someone else, not himself. Erickson, 166 Wis. 2d at 95. Here, however, the circuit court modified the pattern jury instruction applicable to §308, Wis JI--Civil 1014, to conclude with the phrase "unreasonable risk of harm to himself" instead of "unreasonable risk of harm to others," contrary to Erickson.

¶21. The negligent entrustment theory at issue in this case appears in §390 of the Restatement:

§390 Chattel for Use by Person Known to be Incompetent

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others who the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts §390 (1965). This section of the Restatement was adopted by the court of appeals in Halverson v. Halverson, 197 Wis. 2d 523, 530, 541 N.W.2d 150 (Ct. App. 1995). However, there is no pattern jury instruction for use in §390 cases.

¶22. The two theories of negligent entrustment are related but not

identical. The commentary to §390 explains that "[t]he rule stated in this Section is a special application of the rule stated in §308.... This Section deals with the supplying of a chattel to a person incompetent to use it safely...." Restatement (Second) of Torts §390, cmt. b. Had the jury been instructed on §390, it might have concluded that because Stehlik was a professional driver and part-time law enforcement officer experienced in stock car racing, motorcycle, and moped driving, he was not incompetent to use the ATV safely and therefore the Rhoads were not negligent in entrusting him with it. On the other hand, the jury might have concluded that the Rhoads were negligent in entrusting their ATV to Stehlik because he had been drinking and was therefore incompetent to use it safely.

¶23. A §308 claim is a bit broader, and can be asserted any time the circumstances are such that the defendant knew or should have known that the person to whom he is entrusting an item is likely to use it in a way that creates an unreasonable risk of harm to others. But §308 has never been extended to cases such as this one involving self-inflicted harm by the one to whom an item is allegedly negligently entrusted. In fact, as noted above, Erickson specifically held that it does not apply to such cases. Erickson, 166 Wis. 2d at 95.

¶24. The distinction noted here may not have made a difference on the facts of this case, and no one raised the issue on appeal. We address it because we are remanding for a liability retrial, and to emphasize that this case should not be construed as a sub silentio overruling of Erickson or an extension of §308 to cases involving self-inflicted injuries. In addition, this discussion has a bearing on our analysis of the liability of an ATV owner for an adult ATV user's failure to wear an available helmet. See infra Part V.

IV

¶25. The parties dispute whether, and to what extent, the principles applicable to the so-called "seat belt defense" also govern the "helmet defense" asserted here. The seat belt defense was first recognized in Bentzler v. Braun, 34 Wis.2d362, 385, 149 N.W.2d626 (1967).

¶26. In Bentzler, this court concluded that the common law duty to exercise ordinary care for one's own safety contemplated the use of available seat belts to protect against serious injury in an automobile accident. Id. The court reached this conclusion "independent of any statutory mandate," id., because of the common knowledge, supported by statistical evidence, that seat belts save lives and reduce injury:

While it is apparent that these statistics cannot be used to predict the extent or gravity of injuries resulting from

particular automobile accidents involving persons using seat belts as compared to those who are not using them, it 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. A person riding in a vehicle driven by another is under the duty of exercising such care as an ordinarily prudent person would exercise under similar circumstances to avoid injury to himself.

Id. at 386-87.

¶27. The Bentzler analysis of the seat belt defense logically and conceptually applies to the helmet defense asserted in this case. Significantly, the absence of a statute mandating seat belt use was not decisive in Bentzler; nor is the absence of a statute mandating helmet use by adult ATV riders decisive here.⁶ In this context, as in Bentzler, the safety benefits of wearing a helmet while operating or riding a non-enclosed vehicle such as an ATV are a matter of common knowledge, supported by statistical evidence.⁷

¶28. ATVs are, after all, open-air, motorized vehicles capable of reaching moderate to high speeds, and are, by design, intended to be operated on all types of off-road terrain. See Gregory B. Rodgers, All-Terrain Vehicle Injury Risks and the Effects of Regulation, 25 Accident Analysis & Prevention 335-346 (1993). The risks associated with ATVs are well-known. See James C. Helmkamp, A Comparison of State-Specific All-Terrain Vehicle Related Death Rates, 1990-1999, 91 Am. J. Pub. Health 1792-1795 (2001). Under these circumstances, an ordinarily prudent person knows or reasonably should know that wearing a safety helmet while operating or riding an ATV protects against serious head injury. Accordingly, consistent with the rationale of Bentzler, we conclude that the common law duty of ordinary care for one's own safety can encompass the use of a safety helmet while operating or riding an ATV.⁸

¶29. We caution that the failure to wear a safety helmet while on an ATV, like the failure to wear a seat belt while in an automobile, is not negligence per se:

Failure to wear seat belts is not negligence per se, but "where seat belts are available and there is evidence before the jury indicating [a] causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard. A jury in such case could conclude that an occupant of an

automobile is negligent in failing to use seat belts."

Foley, 113 Wis. 2d at 483 (quoting Bentzler, 34 Wis. 2d at 387). The helmet defense recognized here, like the seat belt defense recognized in Bentzler, is generally a question for the jury.²

¶30. The effect of the seat belt defense on liability and damages was addressed 16 years after Bentzler in Foley. There, this court distinguished "seat belt negligence" from active and passive negligence and separated the jury's consideration of seat belt negligence from the basic comparison of negligence, establishing it instead as a limitation on recoverable damages. Foley, 113 Wis. 2d at 484-90.

¶31. Foley described the distinction between active, passive, and seat belt negligence in this way:

This court has used the term "passive negligence" to describe the conduct of a passenger who fails to use ordinary care for his or her own safety where the passenger's conduct is found to be a cause of his or her injury but not of the collision. Active negligence describes a person's conduct in failing to use ordinary care when that conduct is a cause of the collision. A passenger can be found both actively and passively negligent, depending on the circumstances. Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis. 2d 91, 105, 118 N.W.2d 140 (1962).

It is true that failure to use available seat belts in this case (and in the ordinary case) is not a cause of the collision and would thus appear to fall within the category "passive negligence," but we decline to label seat-belt negligence as "passive" negligence because the seat-belt defense doctrine rests on considerations different from those involved in "passive negligence."

In the usual case of passive negligence, the passenger could have prevented injury completely by taking some action: e.g. refusing to ride with that particular driver at that particular time, or warning of a hazard. In contrast, a passenger who wears a seat belt can not usually avoid all injury. Since failure to wear seat belts generally causes incremental injuries, damage for these incremental injuries can be treated separately for purposes of calculating recoverable damages. In contrast injuries caused by passive negligence are identical to injuries caused by the active negligence in the same accident, and the damages due to passive negligence can not be separated easily for purposes of calculating recoverable damages.