

Committee Name:
Senate Committee –
Judiciary, Corrections and Privacy
(SC–JCP)

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MEMORANDUM

To: Members of the Wisconsin Legislature

From: Eric Englund

Date: August 6, 2003

Subject: Senate Bill 223
Assembly Bill 455
Use or Non-Use of Protective Headgear as Evidence in Civil Actions

The Wisconsin Insurance Alliance (WIA) is opposed to SB-223 and AB-455.

BACKGROUND

Under current law, if an individual is injured or killed as a result of negligence, that person or their estate may recover damages from the person that caused the accident. The recovery of damages can be reduced in proportion to the negligence of the person injured or killed. In 2002, the Wisconsin Supreme Court held in *Stehlik v. Rhoads*, (see <http://www.wicourts.gov/html/sc/99/99-3326.htm>), that the failure of an adult ATV operator to wear a helmet could be considered by a jury in reducing the damages recoverable by the injured person. For example, a person driving a motorcycle/ATV or snowmobile without a helmet is injured when the driver of a car fails to stop at a stop sign and runs into them. The operator of the motorcycle/ATV or snowmobile sustains injuries. It is determined that those injuries would have been reduced by 40% if the operator of the motorcycle/ATV or snowmobile had been wearing a helmet. Under existing Wisconsin law, the operator of the vehicle that crashed into the motorcycle/ATV or snowmobile would not have to pay for 40% of those damages.

SB-223 and AB-455 prohibit the introduction of evidence as to whether or not the driver of the motorcycle/ATV or snowmobile was wearing a helmet, thus reducing the potential for that individual's damages to be reduced by the portion of their injuries sustained because they were not wearing a helmet. Interestingly, the legislation specifically allows the introduction of this evidence when the driver of the motorcycle/ATV or snowmobile sues the manufacturer of the helmet alleging that the driver of the motorcycle/ATV or snowmobile was injured because of a defective design in the helmet.

The concept of an injured person's damages being reduced by their failure to use a safety device is common in Wisconsin tort law. An exception is created in the instance where a person's failure to use a seat belt magnifies the damages they incur when they are injured as a result of the negligence of a third party. In that instance, the maximum reduction of the damages has been set statutorily at 15 percent (see Sec. 347.48(g) Wis. Stat.).

ARGUMENTS IN OPPOSITION

- 1) The legislation is a typical "I want my cake and eat it too" effort. On the one hand, individuals whose damages are magnified through not wearing a helmet don't want to suffer the consequences of reduced compensation. On the other hand, they admit that helmets are a safety device and want evidence of their wearing a helmet to be used when they turn around and sue a manufacturer alleging that the helmet was defective.

- 2) Studies have demonstrated that the use of helmets reduces the severity of injuries:
 - a. The National Highway Traffic Safety Administration (NHTSA) estimates helmets reduce the risk of fatal head injuries by 40 percent.
 - b. Motorcycle fatalities have declined in states that have reinstated or enacted a motorcycle helmet law.
 - c. Hospital costs for unhelmeted riders were 8% percent higher than helmeted riders according to a 1996 NHTSA Crash Outcome Data Evaluation System study. .
 - d. Healthcare costs for head injuries sustained in motorcycle accidents declined 17 percent (study done in San Diego, California) and 38 percent (Nebraska) in states with a mandatory helmet law.
- 3) The question of whether or not the failure to wear a helmet contributed to the severity of head injuries sustained in motorcycle/ATV or snowmobile accident is a question of fact which will be determined by a jury based upon the submittal of evidence.
- 4) While Wisconsin law gives drivers and passengers a choice of wearing helmets, once an individual makes the choice they should be held accountable for that personal choice. The risk inherent in riding a motorcycle and the failure to use safety equipment add to the risk of injury or enhanced injury. This additional assumption of risk by the person who fails to use safety equipment should be assessed against them, and should not be paid for by a third party.

Should you have questions, comments and/or concerns, please feel free to contact me.