1278 SAFETY HELMET: FAILURE TO USE

No instruction.

COMMENT

This commentary was prepared in 2004 and updated in 2009.

See Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 889; Hardy v. Hoefferle, 2007 WI App 264, 306 Wis.2d 513, 743 N.W.2d 843; Wis. Stat. § 895.049.

There is no instruction covering the failure to wear a safety helmet. In 2002, the Wisconsin Supreme court decided Stehlik v. Rhoads, supra, in which the court considered the availability and effect of the "helmet defense."

The plaintiff in Stehlik was injured while riding an all-terrain vehicle. The jury concluded that both the plaintiff and the ATV's owners were negligent and apportioned the accident negligence (30% plaintiff/70% defendant) and the "helmet negligence" (40% plaintiff / 60% defendant). The jury also concluded that 90% of the plaintiff's injuries were attributable to his failure to wear a helmet. The trial court's special verdict followed the formula for seat belt negligence established in Foley v. City of West Allis, 113 Wis.2d 475, 335 N.W.2d 824 (1983).

On motions after verdict, the trial judge struck the special verdict questions regarding the defendant's 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 percentBthe percentage of his injuries the jury allocated to the failure to wear a helmet.

Applying Foley to Safety Helmet Cases. The supreme court in Stehlik concluded that a plaintiff's negligent failure to wear a safety helmet is governed by the principles applicable to a plaintiff's negligent failure to wear a seat belt established in Foley v. City of West Allis, supra. 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.

Helmet Verdict Format. The supreme court in Stehlik held the jury in a helmet defense case should apportion accident negligence *separately* from helmet negligence. Only the former is subject to Wis. Stat. § 895.045, because helmet negligence, like seat belt negligence, is a limitation on damages, not a potential bar to recovery. The court distinguished safety helmet negligence from seat belt negligence and said the helmet negligence comparison question should ask the jury 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.

The court of appeals in Hardy v. Hoefferle summarized the helmet verdict format established by Stehlik as follows:

> Where the "helmet defense" is raised, a jury must make two negligence determinations. The jury must first determine and allocate "accident negligence," which refers to who caused the accident itself. The contributory negligence statute, Wis. Stat. § 895.045, applies to the jury's allocation of "accident negligence" and may reduce or bar the plaintiff's recovery.
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> The amount that remains recoverable after applying the contributory negligence statute is then subject to a second negligence allocation, which our supreme court referred to as "helmet negligence." Before engaging in the "helmet negligence" inquiry, a jury must first decide whether the plaintiff's failure to wear a helmet was a causal factor in the plaintiff's injuries. If so, the jury must allocate "helmet negligence" between the plaintiff and the defendant. The percentage of "helmet negligence" allocated to the plaintiff further reduces the amount otherwise recoverable under the "accident negligence" inquiry. However, Wis. Stat. § 895.045's provision barring recovery where a plaintiff's negligence exceeds a defendant's negligence does not apply to a jury's allocation of "helmet negligence."

In Hardy, the court of appeals held that where § 895.049 applies to prohibit a reduction of damages, it necessarily also precludes a person's failure to wear a helmet from being considered a form of negligence. Hardy v. Hoefferle, supra. ¶12

Legislation on Failure to Wear Protective Headgear. In 2004, the Wisconsin Legislature enacted 2003 Wisconsin Act 148 (creating Wis. Stat. § 895.049 and 901.053) to override the common law established in Stehlik. The act is effective for actions commenced on or after March 30, 2004.

The effect of the statute is to exempt certain plaintiffs from the Stehlik "helmet negligence" inquiry. The legislation provides that: "failure by a person who operates or is a passenger on a motorcycle, as defined in s. 340.01 (32), an all-terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, to use protective headgear shall not reduce recovery for injuries or damages by the person or the person's legal representative in any civil action."

The legislation also provides that evidence of "use or nonuse of protective headgear by a person, other than a person required to wear protective headgear under s. 23.33 (3g) or 347.485 (1), who operates or is a passenger on a motorcycle, as defined in s. 340.01 (32), an all-terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, is not admissible in any civil action for personal injury or property damage."