# Notes

## THE MOTORCYCLE HELMET DEFENSE IN ARIZONA

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Becky Cheney negligently struck Joseph Warfel's motorcycle with her automobile while he waited at a red light. The collision injured Warfel, who was not wearing a motorcycle helmet. Warfel sued, resulting in the birth of the motorcycle helmet defense in Arizona.[1]

The motorcycle helmet defense allows the reduction or denial of recovery to plaintiffs who fail to wear motorcycle helmets.[2] In a contributory negligence jurisdiction, failure to wear a helmet may prohibit recovery altogether.[3] In a comparative negligence jurisdiction, if the failure constitutes comparative negligence, courts reduce recovery based on the degree of negligence determined by the jury.[4] If the jurisdiction applies the doctrine of avoidable consequences, the plaintiff cannot recover any damages which a helmet could have prevented.[5]

This Note examines the events leading to the establishment of the helmet defense, including legislative action and the treatment of the defense by other courts. It focuses primarily on *Law v. Superior Court*,[6] the seatbelt case providing the precedential basis for *Warfel v. Cheney* decision. The *Law* and *Warfel* decisions are analyzed. Finally, the Note discusses possible legislative solutions to the problems raised by defenses involving safety devices.

### CASE LAW HISTORY OF THE MOTORCYCLE HELMET DEFENSE

The Maryland Court of Appeals became the first court to consider the helmet defense in *Rogers v. Frush*.[7] In that case, defense counsel used three different theories to justify the helmet defense. First, the defense argued that

1. Warfel v. Cheney, 157 Ariz. 424, 758 P.2d 1326 (Ariz. Ct. App. 1988).
2. *Id. See also* Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983).
3. PROSSER AND KEETON ON TORTS § 65, at 451-52 (5th ed. 1984). "[A]lthough the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitle him to maintain the action."
4. *Warfel*, 157 Ariz. at 429, 758 P.2d at 1331.
5. *Halvorsen*, 336 N.W.2d at 121.
6. 157 Ariz. 147, 755 P.2d 1135 (1988).
7. 257 Md. 233, 262 A.2d 549 (1970).

failure to wear a helmet constituted contributory negligence.[8] In rejecting this argument, the court noted that no statutory duty to wear a helmet existed at the time of the accident.[9] According to the court, legislation passed three years after the accident did not show that the plaintiff failed to meet the standard of conduct expected by the general public.[10] The court also refused to adopt the defense's second theory, the doctrine of avoidable consequences. It reasoned that the post/pre-accident distinction applied.[11] Finally, the court held that the plaintiff's failure to wear a helmet did not constitute assumption of the risk, the third theory advanced. The failure to wear a helmet, even in the face of a known and appreciated risk, did not end the defendant's duty to operate her vehicle in a reasonable and prudent manner.[12]

The Minnesota Supreme Court next considered the defense in *Burgstahler v. Fox*.[13] That court also refused to permit the helmet defense, citing *Rogers* with little other discussion.[14] Similarly, in *Bond v. Jack*[15] the Louisiana Court of Appeals rejected the defense with little discussion, stating only that the failure to wear a helmet did not constitute contributory negligence.[16]

The first court to recognize the defense was the Supreme Court of Monroe County, New York in *Dean v. Holland*.[17] The *Dean* court noted that a mandatory helmet law existed and said that the violation of such a statute could be considered contributory negligence.[18] In order to have damages reduced, however, the defendant had to prove that the failure to wear a helmet proximately caused the injuries.[19]

In *Halvorsen v. Voeller*,[20] North Dakota became the first state to permit the helmet defense in the absence of a mandatory helmet law.[21] The North Dakota Supreme Court first noted that comment c to section 465 of the Restatement (Second) of Torts calls for apportionment of harm to different causes when antecedent negligence of the plaintiff contributes to the increased harm, despite not causing the accident.[22] The court then rejected the post/pre-accident distinction as a basis for precluding the use of the doctrine of avoidable consequences.[23] The court stated that a safety helmet provides an "unusual and ordinarily unavailable" method for avoiding damages

8. *Id.* at 238, 262 A.2d at 552.
9. *Id.* at 239, 262 A.2d at 552.
10. *Id.* at 239-40, 262 A.2d at 552.
11. *Id.* at 240-43, 262 A.2d at 553.
12. *Id* at 243-44, 262 A.2d at 554.
13. 290 Minn. 495, 186 N.W.2d 182 (1971).
14. *Id* at 496, 186 N.W.2d at 183.
15. 387 So. 2d 613 (La. Ct. App. 1980).
16. *Id.* at 616.
17. 76 Misc. 2d 517, 350 N.Y.S.2d 859 (N.Y. Sup. Ct. 1973).
18. *Id* at 519, 350 N.Y.S.2d at 861.
19. *Id.*
20. 336 N.W.2d 118 (N.D. 1983).
21. In 1977, North Dakota amended its helmet law to require only riders under the age of 18 to wear helmets. N.D. CENT. CODE § 39-10.2-06 (1977).
22. RESTATEMENT (SECOND) OF TORTS § 465 comment c (1965).
23. *Halvorson*, 336 N.W.2d at 120-21.

*before* the accident.[24] Thus, the "unusual" opportunity justified the departure from the traditional post/pre-accident distinction and the reduction in damages attributable to the failure to wear a safety helmet.[25]

The Colorado Supreme Court held that the failure to wear a helmet did not constitute comparative negligence in *Dare v. Sobule*.[26] The court reasoned that for negligence to be found some legal duty or standard of care must exist. No mandatory helmet law existed in Colorado, and the court refused to impose one, adopting the reasoning of an earlier Colorado seatbelt decision.[27]

The federal government encouraged states to enact mandatory helmet laws, and the United States Department of Transportation made federal highway funding contingent on the passage of such laws. By 1975, 47 states, including Arizona, had mandatory helmet laws.[28] The Highway Safety Act of 1976, however, withdrew the Department of Transportation's authority to require mandatory helmet laws.[29] A number of states then repealed or amended their helmet use statutes.[30] Arizona's legislature amended the Arizona statute to require only riders under the age of 18 to wear helmets.[31] Thus, while courts moved towards accepting the helmet defense, legislators across the country left the choice whether to wear a helmet to the individual.

## THE *WARFEL* DECISION

Arizona courts first recognized the helmet defense in *Warfel v. Cheney*.[32] The *Warfel* court relied on the landmark seatbelt decision *Law v. Superior Court*[33] in establishing the helmet defense.[34] The court began by judicially recognizing motorcycle helmets as a safety device generally reducing injury and death to the rider involved in an accident.[35] Thus, the court concluded, the *Law* reasoning concerning safety devices applied to motorcy-

24. The court adopted the reasoning of the seatbelt defense case, Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974). The Spier court justified, in part, its adoption of the seatbelt defense based upon the uniqueness of the seatbelt: "the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages *prior* to the accident."

25. *Halvorson*, 336 N.W.2d at 121.

26. 674 P.2d 960, 962-63 (Colo. 1984).

27. *Id* at 962 (citing Fischer v. Moore, 183 Colo. 392, 396, 517 P.2d 458, 460 (1973), which held that "the seat belt defense . . . is not an affirmative defense to an action for negligence, and evidence that the injured party failed to wear a seat belt may not be brought before the jury in any form to establish contributory negligence or to reduce the amount of the injured party's damages.").

28. *Warfel*, 157 Ariz. at 428-29, 758 P.2d at 1330-31. *See generally Helmetless Motorcyclists—Easy Riders Facing Hard Facts: The Rise of the "Motorcycle Helmet Defense"*, 41 OHIO ST. L.J. 233 (1980)[hereinafter *Helmetless Motorcyclists*].

29. Pub. L. No. 94-280, tit. II, 90 Stat. 451, § 208(a) (1976).

30. *Warfel*, 157 Ariz. at 429, 758 P.2d at 1331 (*Helmetless Motorcyclists, supra* note 28, at 238-39 n.39-43.

31. ARIZ. REV. STAT. ANN. § 28-964 (1976) applies to individuals "under eighteen years of age."

32. 157 Ariz. 424, 758 P.2d 1326 (Ariz. Ct. App. 1988).

33. 157 Ariz. 147, 755 P.2d 1135 (1988).

34. *See infra* notes 39-73 and accompanying text.

35. The court stated "we thus begin by taking judicial recognition of the motorcycle helmet as a 'safety device' that generally reduces risk of death and significant head injury in the event of a traffic accident." *Warfel*, 157 Ariz. 428, 758 P.2d at 1330.

cle helmets.[36] Applying the principles enunciated in *Law*, the court held evidence of helmet nonuse relevant to the determination whether the plaintiff could have avoided injuries and to the reduction in damages attributable to the helmet nonuse.[37] In doing so, the Arizona Court of Appeals became one of the few courts in the nation to permit the helmet defense.[38]

*The* Law *Decision*

In the *Law* decision, the Arizona Supreme Court permitted the jury to consider evidence of seatbelt nonuse when computing damages.[39] The court overruled *Nash v. Kamrath*,[40] a factually similar case decided under the contributory negligence regime.

In *Nash*, the court of appeals held evidence of a passenger's failure to wear a seat belt inadmissible to prove either contributory negligence or breach of the plaintiff's duty to minimize damages.[41] The *Nash* court based its decision on three points. First, the court stated that motor vehicle operators may assume other drivers will not be negligent, unless they have reason to know that assumption is incorrect.[42] Next, the court stated that the seatbelt itself may pose a hazard to automobile operators,[43] and to impose a duty to wear such a device would be unreasonable.[44] Finally, the court held that a motorist had no duty to use a seat belt and failure to do so could not be considered a breach of a duty to minimize damages.[45]

In departing from *Nash*, the *Law* court based its decision on changes in technology and in tort principles, most notably the legislative change from contributory to comparative negligence.[46] The *Law* court rejected the first *Nash* argument and held that every motorist has a "responsibility" to protect themselves against the consequences of an accident:

> Rejection of the seat belt defense can no longer be based on the antediluvian doctrine that one need not anticipate the negligence of others. There is nothing to anticipate; the negligence of motorists is omnipresent.[47]

Next, the *Law* court stated that seatbelts rarely cause harm and, "as a gen-

36. *Id.*

37. *Id* at 429-30, 758 P.2d at 1331-32.

38. *Warfel*, 157 Ariz. 424, 758 P.2d 1326, and *Halvorson*, 336 N.W.2d 118, are the only two decisions to permit the helmet defense in the absence of a statutory duty. Dean v. Holland, 76 Misc. 2d 517, 350 N.Y.S.2d 859 (1973), permitted helmet evidence, but that state had a mandatory helmet law in effect.

39. *Law*, 157 Ariz. at 155, 755 P.2d at 1143.

40. 21 Ariz. App. 530, 521 P.2d 161 (1974).

41. *Id.* at 532-33, 521 P.2d at 163-64.

42. *Id.* at 532, 521 P.2d at 163.

43. *Id.*

44. "Certainly the plaintiff should not be required to 'truss himself up in every known safety apparatus before proceeding on the highway' " *Id* at 532, 521 P.2d at 163, *citing* Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS LAW JOURNAL 613 (1967).

45. *Id.* at 533, 521 P.2d at 164.

46. In 1984, the Arizona Legislature passed the Uniform Contribution Among Tortfeasers Act, codified at ARIZ. REV. STAT. ANN. §§ 12-2501 through -2509 (Supp 1988).

47. "Rejection of the seat belt defense can no longer be based on the antediluvian doctrine that one need not anticipate the negligence of others. There is nothing to anticipate: the negligence of motorists is omnipresent." *Law*, 157 Ariz. at 152, 755 P.2d at 1140.

eral rule, a motorist is simply better off wearing a seat belt."[48] The court found the argument that seat belts cause harm unpersuasive.[49] Finally, the court held that the seat belt defense did not actually raise a "duty" question.[50] The failure to wear a seat belt, the court reasoned, is not a breach of duty to another, but "part of the related obligation to conduct oneself reasonably to minimize damages and avoid foreseeable harm to oneself."[51]

The court then analyzed the problem under comparative negligence principles, focusing on the term "fault."[52] Noting that Arizona's comparative negligence statute did not include a definition of fault, the court used the definition given in the Uniform Comparative Fault Act.[53] Fault, under this Act, specifically includes unreasonable failure to avoid injury or to mitigate damages.[54]

The court concluded that under the comparative negligence statutes, the doctrine of avoidable consequences applied to pre-accident conduct for the limited purpose of calculating damages.[55] Although the doctrine of avoidable consequences at common law applied only to post-accident conduct,[56] the court held that the comparative negligence statute modified the common law rule, and applied the doctrine to pre-accident conduct.[57] The question was not one of duty, rather of an obligation to minimize foreseeable injuries and damages.[58] Thus, failure to wear an available seatbelt may constitute "fault",[59] and the damages proximately caused by that "fault" cannot be recovered.[60]

### *Criticism of* Law

Although the *Law* decision may appear fair, the reasoning used can be questioned. Apparently, the seat belt situation presented a problem that did not fit neatly under comparative negligence or avoidable consequences theory. Arizona's comparative negligence statute provides for a reduction in damages only when the jury finds assumption of risk or contributory negli-

48. *Id* at 153, 755 P.2d at 1141.

49. *Id* at 152-53, 755 P.2d at 1140-41.

50. "More importantly, evaluating seat belt nonuse under the rubric of duty fundamentally confuses that concept with the evaluation of the conduct that may or may not fulfill it .... Nonuse of a seat belt is not a question of duty but rather a matter of conduct which only occasionally impinges on others." *Id.* at 153, 755 P.2d at 1141.

51. *Id.* at 153, 755 P.2d at 1142.

52. *Id* at 154, 755 P.2d at 1142.

53. *Id.*

54. " 'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. *The term also includes . . . unreasonable failure to avoid an injury or to mitigate damages*" (emphasis in *Law* opinion). *Id.* (citing Unif. Comparative Fault Act, 12 U.L.A. 39-40 (Cum. Supp. 1987)).

55. *Law*, 157 Ariz. at 154, 755 P.2d at 1142.

56. PROSSER AND KEETON, *supra* note 3, at 458.

57. "Thus, as far as the calculation of damages is concerned, the comparative negligence statutes apply the doctrine of avoidable consequences to pre-accident conduct." *Law*, 157 Ariz at 154, 755 P.2d at 1142.

58. "Our examination of the applicable caselaw and our analysis of the concept of 'duty' lead us to the conclusion that the seat belt defense is not a question of duty at all." *Id* at 155, 755 P.2d at 1143.

59. *Id.*

60. *Id.*

gence.[61] As the dissent in *Law* points out, the statute indicates that comparative negligence cannot exist without a finding of assumption of the risk or contributory negligence.[62] Because seatbelt nonuse rarely contributes to the cause of an accident, contributory negligence should be inapplicable.[63] Traditional comparative and contributory negligence apply only to the threshold issue of liability. Comparative negligence results in reduction of damages commensurate with the plaintiff's degree of fault in *causing* the accident.[64] Thus, because failure to use seat belts rarely causes an accident, traditional comparative or contributory negligence analysis should not be applied to reduce the additional damages caused by seatbelt nonuse.

The doctrine of avoidable consequences does not provide a perfect solution. As previously mentioned, at common law the doctrine of avoidable consequences applied only to post-accident conduct.[65] Because the failure to fasten a seat belt occurs *before* the accident,[66] the *Law* decision does not fit neatly into this model. The helmet defense, combined with the doctrine of avoidable consequences, requires a motorcycle rider to mitigate damages before they occur.

*Law* applies the doctrine of avoidable consequences to pre-accident conduct because the comparative negligence statute modifies the common law doctrine.[67] Pre-accident conduct is not relevant to the determination of comparative negligence, however, unless the definition of fault from the Uniform Comparative Fault Act cited by the court is accepted.[68] The Arizona Legislature did not adopt that definition of fault, although the bulk of the Uniform Comparative Fault Act became Arizona's Comparative Fault law. Furthermore, in a supplemental opinion, Justice Feldman rejected the contention that *Law* relied on the Uniform Act's definition of fault.[69] As a result, the court's reasoning for modifying the doctrine of avoidable consequences is unpersuasive.

The *Law* dissent argues that there can be no reduction of damages unless the plaintiff assumed the risk or was guilty of contributory negligence.[70]

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61. ARIZ. REV. STAT. ANN. § 12-2505(A) (1984):
The defense of contributory negligence or of assumption of risk is in all cases a question of fact . . . *If the jury applies either defense*, the claimant's action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of the injury or death, if any. (emphasis added).

62. *Law*, 157 Ariz. at 158, 755 P.2d at 1146. *See also* Valley Nat'l Bank v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 153 Ariz. 374, 377, 736 P.2d 1186, 1189 (1987): "[U]nder the doctrine of comparative negligence, the jury is required to apportion the damages between the plaintiff and the defendant if it finds that the defendant was negligent and also finds that the plaintiff was guilty of contributory negligence or had assumed the risk" (citing ARIZ. REV. STAT. ANN. § 12-2505 (1987)).

63. *Law*, 157 Ariz. at 158, 755 P.2d at 1146 (citing Vizzini v. Ford Motor Co., 569 F.2d 754, 769-70 (1977) (Weis, J., concurring and dissenting)).

64. *Halvorson*, 336 N.W.2d at 119.

65. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 33, at 129 (1935): "[W]here the defendant has already committed an actionable wrong, then this doctrine limits plaintiff's recovery by disallowing only those items of damages which could reasonably have been averted."

66. The seat belt and helmet defenses are predicated on the plaintiff failing to wear a safety device. That failure subsequently causes additional damage when the accident takes place.

67. *Law*, 157 Ariz at 154, 755 P.2d at 1142.

68. *See supra* note 52.

69. *Law*, 157 Ariz. at 160, 755 P.2d at 1148.

70. *Id.* at 158, 755 P.2d at 1146 (Holohan, J., dissenting).

This position may be too extreme. Courts occasionally holds defendants liable for their contribution to accident damages even though the defendant did not cause the accident.[71] The so-called "crashworthiness" cases[72] illustrate this point. Courts hold automobile manufacturers liable for damages suffered by the plaintiff even though the manufacturer did not cause the accident.[73] If the automobile is unnecessarily dangerous, products liability theory holds the manufacturer liable, although the manufacturer's fault did not cause the accident. There appears to be no justification for treating the plaintiff differently than the defendant automobile manufacturer because both cause damages despite not causing the accident.

## LEGISLATIVE ROLE AND POSSIBLE SOLUTIONS

*Law* also presented the Supreme Court with another problem: whether the legislature should decide such a question.[74] Other jurisdictions considering the seat belt defense found it acceptable within tort principles, but refused to permit the defense, deferring to their legislature.[75] In these decisions, the courts reasoned that allowing the seat belt defense created a duty to wear belts, and that the legislature, not the courts, should impose the duty.[76]

The *Law* court, however, stated that the seat belt defense involved no question of duty:[77]

> More importantly, evaluating seat belt nonuse under the rubric of duty fundamentally confuses that concept with the evaluation of the conduct that may or may not fulfill it. Duty is the "obligation, recognized by law, which requires [an actor] to conform to a particular standard of conduct in order to protect others against unreasonable risk of harm."[78]

While this definition is unobjectionable, the court ignores the concept of duty implicit in contributory negligence:

> Contributory negligence is conduct by the plaintiff, contributing as a legal cause to the harm suffered, which falls below *the standard for which he is required to conform for his own protection*.[79]

The court's characterization of duty as only relating to third persons is not persuasive enough to dispense with the duty question. Indeed, the dissent called the majority's statement that the seatbelt defense did not involve a duty question "sophistry."[80]

Arizona courts dictate that motorists wear seat belts and motorcyclists

71. Caiazzo v. Volkswagenwerk A. G., 647 F.2d 241 (1981).

72. *See, e.g.*, Brandenburger v. Toyota Motor Sales, U.S.A. Inc., 162 Mont. 506, 513 P.2d 268 (1973); Baumgardner v. Am. Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974); Seattle-First Nat'l Bank v. Volkswagen of Am., Inc., 11 Wash. App. 929, 525 P.2d 286 (1974).

73. *See, e.g.*, *Brandenburger*, 162 Mont. 506, 513 P.2d 268; *Baumgardner*, 83 Wash. 2d 751, 522 P.2d 829; Seattle-First Nat'l Bank, 11 Wash. App. 929, 525 P.2d 286.

74. *Law*, 157 Ariz at 155-56, 755 P.2d at 1143-44.

75. Thomas v. Henson, 102 N.M. 326, 695 P.2d 476 (1985).

76. *Id.*, 102 N.M. at 327, 695 P.2d at 477.

77. *Law*, 157 Ariz. at 152, 755 P.2d at 1141.

78. *Id.* (citing Markowitz v. Arizona Parks Board, 146 Ariz. 352, 706 P. 2d 364 (1985)).

79. RESTATEMENT (SECOND) OF TORTS § 283 comment f (1965).

80. *Law*, 157 Ariz. at 159, 755 P.2d at 1147.

wear helmets or suffer reduction in damages under the comparative fault statute.[81] The question remains, then, whether the judiciary can properly impose such a duty.

The *Law* majority did not hesitate to impose an "obligation." Noting that the legislature never enacted a mandatory seatbelt law, the court refused to consider legislative inaction as approval of seat belt nonuse.[82] The dissent stated that the legislature is the better branch of government to decide the issue, because it has more information and concern for public support.[83]

*Warfel's* establishment of the helmet defense presented a different problem. While Arizona's legislature never enacted a mandatory seatbelt law, it did enact and subsequently amend a mandatory helmet law.[84] The *Warfel* court refused to distinguish *Law* on this basis.[85] The court also refused to interpret the amendment by the legislature to mean that helmets do not protect riders over 18.[86]

The legislature intended, however, to permit helmet nonuse,[87] calling into question the *Warfel* court's decision which requires riders to wear helmets or suffer a reduction in damages.[88] The *Warfel* decision, whether using the term "obligation" or "duty," mandates helmet use despite contrary legislative intent.

*Possible Legislation for Arizona*

The Arizona Legislature should review the helmet issue. The helmet defense does not fit neatly into any tort theory.[89] Therefore, rather than try to adapt the defense to tort doctrine, the legislature should create a duty to wear a helmet or determine the effects of helmet nonuse.

If the legislature imposes a duty to wear a helmet, helmet nonuse will constitute contributory negligence *per se*.[90] Arizona's comparative fault statute would then deny recovery of the damages attributable to that negligence.[91] This result does not stretch tort doctrines to reach an equitable result. The motorcyclist knows the law requires helmet use and should suffer the consequences of noncompliance.

In arriving at its decision, the legislature should consider the tension between equity and causation. The more courts rely on causation to determine the reduction of damages, the more the principles of equity suffer. Under strict causation principles, if a negligent driver strikes a motorcyclist who suffers one-hundred-thousand dollars in damages caused by helmet

81. *Id.*
82. *Id.*
83. *Id.*
84. ARIZ. REV. STAT. ANN. § 28-964(A) (1976).
85. *Warfel*, 157 Ariz. at 429, 758 P.2d at 1331.
86. *Id.*
87. As evidenced by the amendment of the helmet law which now does not require riders over the age of 18 to wear a helmet. ARIZ. REV. STAT. ANN. § 28-964(A).
88. *Warfel*, 157 Ariz. at 429-30, 758 P.2d at 1331-32.
89. *See supra* notes 59-73.
90. PROSSER AND KEETON, *supra* note 3, at 227.
91. *See* ARIZ. REV. STAT. ANN. § 12-2505 (1988).

nonuse, the rider collects nothing.[92] However, denying recovery on these facts is not the most equitable result. Helmet use merely prevents additional damages. The automobile driver, on the other hand, through the use of reasonable care, can prevent the accident from occurring, obviating any need for the motorcyclist to wear a safety helmet.

Putting a cap[93] on the reduction of damages is one possible answer to this problem. A percentage limitation of the amount of reducible damages prevents complete denial of recovery to the motorcyclist in the previous example. The greater the limitation put on the reduction, however, the further the result diverges from principles of causation. Assume the statutory cap is 10 percent of the damages. In the above example, the reduction in damages would be ten-thousand dollars. Strictly speaking, the nonuse of a helmet caused the total damages of one-hundred thousand dollars, yet the plaintiff is forced to pay ninety-thousand dollars in damages. Such a result is more in line with the equities involved. While the motorcyclist is partially responsible for his injuries, no injury would have occurred if the defendant had not negligently caused the accident. If no accident takes place, a helmet is unnecessary. This example illustrates the tension between equity and causation, the probable reason courts and commentators have strained to establish a workable seatbelt defense.

The legislature should also consider a collateral consequence of the cap. If the cap is fairly low, say 5 percent, a disincentive exists to assert the defense in cases where the damages at issue are relatively low. On the other hand, if the cap is 95 percent, the defendant is much more likely to assert the defense.[94]

By limiting the amount to be gained from the assertion of the defense, the legislature will limit its use to cases where helmet nonuse caused substantial damages. And the cases with substantial additional damages are also the cases where it seems inequitable to make the motorcyclist bear the entire burden of helmet nonuse. Finding the optimum percentage for the cap will be a difficult, but worthwhile endeavor.

## CONCLUSION

The motorcycle helmet defense presents a problem not easily solved through tort analysis. Although the *Warfel* decision may be unobjectionable in its result, its reasoning is questionable. The helmet defense should be addressed by the legislature. It should pass a statute that does not rely solely on tort doctrine and places a cap on the reduction of damages that best strikes a balance between equity and causation.

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92. Strictly speaking, the motorcyclist is considered to have caused those damages and they are unrecoverable.

93. *See, e.g.*, IOWA CODE ANN. § 321.445.4(b)(2) (West 1988).

94. Take the following example: damages due to nonuse of a helmet are ten-thousand dollars and the cost of an expert who can testify to the causation is five-thousand dollars. If the cap is 5 percent, then the most that damages could be reduced is five-hundred dollars. Here, the cost of asserting the defense greatly exceeds the potential benefit arising from it. On the other hand, if the cap were 95 percent, then the defendant could possibly have damages reduced by nine-thousand-five-hundred dollars. In this case, the defendant stands to gain four-thousand-five-hundred dollars from the assertion of the defense.