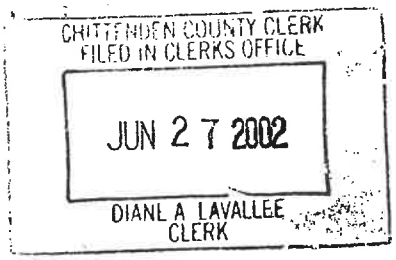
STATE OF VERMONT
CHITTENDEN COUNTY, SS.



BETTY VERBURG, Administratrix of the Estate of Sander Verburg, Plaintiff,	)	Chittenden Superior Court
v.	)	Docket No. 464-00 CnC
ROADSIDE MARINE, INC., and POLARIS INDUSTRIES, INC., Defendants.	)	

MEMORANDUM OF DECISION

Plaintiff's Motion to Strike Affirmative Defenses filed November 14, 2001.

This matter is before the court on Plaintiff's Motion to Strike Defendants' Affirmative Defenses filed November 14, 2001. The Motion also seeks an Order in Limine excluding defendants' expert testimony relating to the "helmet defense." Defendant Roadside Marine filed an Opposition to the Motion on November 29, 2001. Defendant Polaris Industries filed an Opposition on December 7, 2001. Plaintiff replied in support of her Motion on December 31, 2001. A hearing on the Motion was held on April 10, 2002. Plaintiff is represented by Michael I. Green, Esq. Defendant Roadside Marine is represented by Stephen D. Ellis, Esq. Defendant Polaris Industries, Inc., is represented by Timothy J. Mattson, Esq. and John J. Zawistoski, Esq.

This is a wrongful death action brought by Betty Verburg on behalf of the Estate of her husband Sander Verburg. Mr. Verburg died when the all terrain vehicle (ATV) he was operating crashed into a ravine on his farm. Mr. Verburg was not wearing a helmet. Sometime prior to the accident, the ATV, manufactured by Polaris, had been serviced by Roadside Marine. In her Complaint, plaintiff claims that either negligence on the behalf of Roadside Marine or defective design on behalf of Polaris caused the left wheel of the ATV to loosen from the vehicle resulting in both the accident and death of Mr. Verburg. Both defendants assert *inter alia* the affirmative defense of comparative negligence.

In her Motion now before the court, the plaintiff seeks to bar the use of the affirmative defense of comparative negligence, and to preclude admission of testimony regarding whether Mr. Verburg was wearing a helmet, and to bar testimony from the defendants' expert witnesses that Mr. Verburg's injuries would have been significantly reduced or avoided altogether had he been wearing a helmet. Plaintiff argues that the helmet defense should not be allowed because: 1) under Vermont law the helmet defense is not applicable to ATV crashes as Vermont law does

not require an ATV rider to wear a helmet; 2) since seat belt non-use cannot be raised to show negligence in auto accidents, helmet non-use should not constitute negligence for purposes of ATV injuries; and 3) that because the helmet defense has been rejected in bicycle cases, it should similarly be rejected in ATV cases. Defendants each respond in separate motions arguing that Vermont's seat belt legislation is inapplicable to whether the helmet defense should be allowed, that Vermont law does not prohibit the use of the helmet defense for ATVs, and that evidence of failure to wear helmet is evidence of comparative fault and therefore relevant to support the affirmative defense of comparative negligence.[1]

ANALYSIS

As a preliminary matter, there is a basic principle of common law which recognizes that a plaintiff may be negligent for conduct "contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." W. Keeton, Prosser and Keeton on the Law of Torts § 65, at 451 (5th ed. 1984). This tenet defines what is known as contributory negligence and generally operates to bar recovery for the plaintiff even though the defendant may otherwise be liable. Id.; see also Restatement (Second) of Torts § 467 (1965) ("plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.").

To alleviate the harsh reality of contributory negligence (where one party was held responsible for the entire loss even though negligence of both parties produced the injuries), courts and state legislatures sought to modify the doctrine. Prosser and Keeton § 65, at 451. One approach, and the one chosen by the Vermont Legislature, is to allocate responsibility between persons who fail to live up to the standard of ordinary care in proportion to the extent of negligence on the part of each person. This principle was adopted by Legislature in the comparative negligence statute and is applicable without limitation as to subject matter.[2] The

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[1] In its Motion, Defendant Polaris also includes two additional arguments: 1) because the ATV statute precludes careless and negligent operation of an ATV, evidence of non-use of a helmet is required to resolve the question of whether there was any careless and negligent operation; and 2) evidence of the failure to wear a helmet is necessary to resolve whether the manufacturer's warnings on the ATV were sufficient. Because the court's decision rests on other grounds, these two arguments need not be addressed.

[2] The comparative negligence statute reads in part:

> Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants, but the damage shall be diminished by

plaintiff's own conduct is judged by the ordinary principles of negligence and recovery is barred if the plaintiff's negligence is greater than the defendants.

Defendants in this case seek to utilize the comparative negligence statute as an affirmative defense to the plaintiff's negligence claims. According to the defendants, Mr. Verburg was negligent in his failure to wear a helmet while on the ATV, and his negligence contributed to his death. Plaintiff responds that the evidence of non-use of a helmet should be excluded because Vermont law does not require an ATV rider to wear a helmet; absent a legal requirement that a helmet be worn, Mr. Verburg's failure to wear a helmet cannot constitute a violation of the standard of care. According to the plaintiff, allowing the evidence of non-use of a helmet would essentially impose a standard of care on Mr. Verburg that does not exist under Vermont law.

While it is true that under Vermont law there is no specific statute prohibiting the use of ATVs without a helmet, the absence of statutory law does not resolve the question of whether Mr. Verburg had a duty to take reasonable steps to ensure his own safety. See e.g., Smith v. Goodyear Tire & Rubber Co., 600 F.Supp 1561 (D.Vt. 1985) ("[t]he lack of a statutorily or judicially imposed duty means only that the conduct at issue does not establish a prima facie case of negligence or constitute negligence *per se*."). It is well settled in Vermont that "the standard of conduct needed to discharge a duty of care *in any given situation* [is] measured in terms of the avoidance of reasonably foreseeable risks . . . . " Green v. Sherburne Corp., 137 Vt. 310, 312 (1979) (emphasis added). And "[w]here there is no 'settled . . . rule of diligence,' negligence is ordinarily a question for the jury. Baisley v. Missisquoi Cemetery Ass'n, 167 Vt. 473, 480 (1998) (quoting LaFaso v. LaFaso, 126 Vt. 90, 96 (1966)).

The absence of a statute merely means that the case does not call for a determination of negligence *per se*, or that the standard of care is not defined by specific law. It is within the province of the jury to determine both the standard of care, and whether or not it was breached. The jury has the task of establishing the appropriate standard of care depending on whether the risk of injury from failure to wear a helmet was reasonably foreseeable under the circumstances. It is not for the court to determine that Mr. Verburg did not violate any standard of care if a jury could find that under the circumstances, the risk of injury from failing to wear a helmet was such that a reasonable person would have recognized it and taken steps to avoid it. Evidence relating to the use or non-use of a helmet is relevant[3] to a claim that Mr. Verburg's conduct fell below the

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> general verdict in proportion to the amount of negligence attributed to the plaintiff.

12 V.S.A. § 1036.

[3] The court will determine at the close of the evidence whether the evidence presented by the defendants is sufficient to support their comparative negligence defense.

applicable standard of care.[4]

In her argument, plaintiff also claims that because Vermont law prohibits by statute the use of a "seat belt defense" in negligence actions,[5] this court should also prohibit the use of a "helmet defense."[6] Plaintiff argues that because jurisdictions that have addressed the issue and disallowed the helmet defense have done so based on the state legislature's decision to disallow the seat belt defense in auto negligence cases, the court should similarly not allow the helmet defense because Vermont prohibits the seat belt defense. According to the plaintiff, there are no cases from other jurisdictions in which a court allowed the helmet defense when there was state legislation prohibiting the use of the seat belt defense.

The court cannot rule as a matter of law that Vermont's seat belt statute determines whether the court should allow or preclude the use of the helmet defense with respect to off-highway ATV use. In enacting a seat belt law precluding evidence of seat belt use in negligence actions, the Legislature could have, but did not, define a scope of applicability that extended beyond seat belts to other forms of safety devices for vehicle operators in general. Alternatively, it could have suggested a principle of general applicability by defining legislative purpose. It also could have simultaneously amended the ATV law or other similar laws. It did not. Consequently, the court will not extend the language of the statute to preclude evidence of non-use of helmets in negligence actions in which a comparative negligence defense is raised. Because the seat belt statute is plain on its face, narrowly drawn, and in derogation of the competing comparative negligence statute of general applicability, it should only be applied within the terms stated. Tarrant v. Dep't of Taxes, 169 Vt. 189, 197 (1999) (the primary goal in construing a statute is to effectuate the Legislative intent and if that intent is clear from the language of the statute, the statute will be enforced without further statutory construction).

There are good reasons for the court to decline to expand applicability of the statutory seat belt defense to circumstances beyond its stated terms. First, it would be tantamount to usurpation of legislative authority by adding something to either the seat belt statute or the ATV statute that the Legislature did not choose to enact. Second, it would overlook the clear legislative decision to allow comparative negligence as a defense without limitation as to subject

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[4]See the analysis in Smith v. Goodyear Tire & Rubber Co., supra, in which Judge Coffrin analyzed the principles of Vermont law similarly.

[5] The statute reads in part: "[f]ailure to wear a safety belt in violation of this section shall not constitute negligence or contributory negligence in any civil proceeding or criminal action, nor be entered as evidence to bar prosecution of a criminal offense." 23 V.S.A. § 1259(e)

[6] "Seat belt defense" and "helmet defense" are shorthand labels for permitting the defendant to introduce testimony to show that the operator was not using a seat belt or helmet, that such non-use fell below the standard of care required of a plaintiff under negligence law, and that it caused plaintiff's injuries, at least in part.

matter, except where specifically and selectively provided by the Legislature. In enacting 12 V.S.A. § 1036, the Legislature created a broad principle of general applicability: the law of negligence applies to a plaintiff as well, and depending on a plaintiff's own level of negligence, recovery may be limited or barred. Unless or until the Legislature creates exceptions through more specific legislation (as it did in the case of seat belts for automobiles), the comparative negligence statute calls for the application of common law principles of negligence so that negligent persons, including plaintiffs, bear responsibility for injuries in proportion to the level of their negligent conduct.

Finally, foreseeability of injury from failure to wear a helmet on an ATV off-road may be different from foreseeability of injury from failure to wear seat belts in an enclosed vehicle, and therefore the court should be reluctant to rule as a matter of law that the law precluding the seat belt defense is directly applicable to the circumstances of ATV operation involved in this case. It is not at all clear that the foreseeability of injury in the two situations is the same. Since it is traditionally the role of the jury to take evidence of circumstances and determine a standard of care based on foreseeability of injury in the absence of either legislation or common law to the contrary, and since there is neither legislation nor common law to the contrary, the court will leave it to the jury to exercise its function. Again, the analysis in Smith v. Goodyear Tire & Rubber Co. is pertinent:

> First, admitting such evidence would not create a duty but would merely allow the jury to consider the information on the question of negligence. Second, the test of negligence would continue to be whether the person acted *reasonably under the circumstances presented.* The jury's discretion and common sense will remain as a check upon parties that might seek to make wild assertions of negligence. We do not presume to decide whether or not Plaintiff's failure to fasten his seat belt in the instant case was reasonable. We do believe, however, that the arguments on both sides of the issue are such that a reasonable jury could decide either way.

Smith, 600 F. Supp at 1564. The fact that the Legislature decided to change that law on a selective basis with respect to seat belt use in auto tort litigation does not undermine the validity of the analysis of law set forth in Smith.

The case law plaintiff cites from other jurisdictions is not persuasive. The court has reviewed the case law cited by the plaintiff and concludes that each of the courts either fails to adequately consider the broadly applicable statutory principle of comparative negligence, or bases its decision on statutes and case law not pertinent in Vermont. In particular, plaintiff cites three Connecticut cases, Ruth v. Poggie, No. CV 93 52750 S, 1993 WL 498997 (Conn. Super. Ct. November 22, 1993) (failure to wear a motorcycle helmet struck as special defense), Dubicki v. Auster, No. 107712, 1996 WL 150812 (Conn. Super. Ct. March, 7, 1996) (failure to wear a bicycle helmet disallowed as special defense), Pinho ex rel. Estate of Pinho v. Daly, No.

CV000500895S, 2001 WL 576659 (Conn. Super. Ct. 2001) (failure to wear a motorcycle helmet struck as a special defense), all of which do not discuss comparative negligence principles and offer little analysis to support the holding that non-use of a helmet is inadmissible. Each of the Connecticut cases only analogize to that state's seat belt law, stating "since there is not even a duty to wear a motorcycle helmet, as there is to wear a safety belt, it cannot be said that the failure to wear a motorcycle helmet amounts to negligence on the part of the rider." Poggie, 1993 WL 498997, at *4; Dubicki 1996 WL 150812, at *2; Pinho, 2001 WL 576659, at *3.

With respect to bicycle riders, the courts in both Cordy v. Sherwin Williams Co., 975 F.Supp. 639 (D.N.J.1997) (failure to wear bicycle helmet was not a failure to mitigate damages) and Walden v. State, 818 P.2d 1190, 1196 (Mont. 1991) (failure to wear bicycle helmet inadmissible on the issue of damages but harmless error) each reach the conclusion that non-use of a bicycle helmet does not show violation of a statutory duty based on the absence of a specific law requiring the use of a bicycle helmet. While there is no statute that establishes that helmet non-use is negligence *per se*, a jury could nonetheless conclude that riding an ATV without a helmet created a foreseeable risk of injury under certain circumstances and therefore was a breach of the applicable standard of care under traditional negligence principles.

The only case cited by the plaintiff in which the court provides analysis for its decision to disallow the helmet defense is Dare v. Sobule, 674 P.2d 960 (Colo. 1984) (evidence of failure to wear a motorcycle helmet inadmissible for the purpose of showing comparative negligence). In Dare, the Court reviewed Colorado's comparative negligence statute and case law and determined that it would not impose a standard of conduct on persons riding motorcycles for a variety of public policy reasons. However, as in the other cases cited by the plaintiff, the analysis in Dare lacks any explanation of why it would not be within the jury's authority, under traditional common law principles of negligence, to conclude that the forseeability of injury creates a non-statutory common law obligation on the part of ATV riders to prevent foreseeable harm.

It is this court's view that in Vermont the comparative negligence statute demonstrates a strong legislative choice for the general applicability of the principle of comparative negligence, calling for general applicability of the law of negligence. Narrowly focused statutes in derogation of that principle, such as the seat belt law, should be construed to be applicable only within their stated terms. Since the Legislature has not chosen to make an exception to the comparative negligence law for the use of helmets, the general principle of comparative negligence applies, and evidence is relevant if pertinent to either the standard of care or its breach.

Therefore, the court will not strike the defendants' affirmative defense, and will not rule as a matter of law that evidence of non-use of a helmet is irrelevant. It is premature to rule on whether the defendants' individual expert witnesses are qualified to give opinion testimony on whether helmet non-use was the cause of injuries in this case, but defendants are not precluded as a matter of law from calling expert witnesses to give opnion testimony on the subject.

ORDER

For the foregoing reasons:

1) The Plaintiff's Motion to Strike Defendants' Affirmative Defenses is *denied*;

2) Evidence of non-use of a helmet is not precluded;

3) Defendants are not precluded as a matter of law from calling experts on the issue of the effect of helmet use or non-use on Plaintiff's injuries.

Dated at Burlington, Vermont, this 27th day of June, 2002.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge