

Cycle Helmets and Contributory Negligence

Julian Fulbrook is a Barrister and Lecturer in Law at the London School of Economics. He was educated at Exeter (LLB), Cambridge (PhD), Harvard Law School (LLM), and the Inns of Court School of Law. He completed pupillage with Lord Irvine of Lairg, and then practised at the Bar (latterly a door tenant at Doughty Street Chambers). He served on the Torts panel of the former SPTL until 2002.

Contact details:

j.fulbrook@lse.ac.uk

Direct Tel: 020 7955 7244

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Introduction

With yet another attempt in April 2004 to pass a Bill making cycle helmets compulsory for children, an increasingly polarised public debate continues on this issue. Should there be compulsory safeguarding against a potential hazard, or will a mandatory insistence on helmets reduce cycling levels among children, with a long-term risk to their health? So far, the British Parliament has not yet joined the rush of Australian, Canadian and American legislatures in making cycle helmets compulsory¹, but in the meantime the civil courts in personal injury cases have to consider the causal dimensions of whether cycle helmets should be worn by ‘reasonably prudent cyclists’ to prevent or reduce injury. Judges in tort cases do not resolve matters in a policy vacuum. They too are looking carefully at the scientific analysis, and whether in particular circumstances an award of damages may have to be reduced for the cyclist’s own ‘contribution’ to their injuries.

The sponsor of the 2004 Parliamentary Bill, Eric Martlew MP, claimed that there is scientific evidence that, in the event of a fall, helmets substantially reduce injury; and that 80 per cent of the public were on his side:² ‘It has been proved without any shadow of a doubt that cycle helmets reduce brain injuries and save lives’.³ In

* Lecturer in Law, London School of Economics.

¹ States, provinces and localities began adopting laws from about 1987. There is a chart on the USA laws at <http://www.bhsi.org/mandator.htm> Australia was the first country in the world to impose uniform national mandatory bicycle helmet legislation, beginning in 1990.

² *The Newcastle Journal* (1 April 2004). Repeated in the Parliamentary debate on 2nd Reading at *Hansard* House of Commons (23 April 2004), when the Bill failed to attract the necessary 40 votes to avoid a technical closure on excluding ‘strangers’.

³ *The Times* (23 April 2004).

particular he noted that child cyclists are nearly four times more at risk on the roads than adult cyclists, with annual statistics for 2002 showing that, of 133 cyclist deaths, 28 involved children.⁴ Currently it would seem that about 22 per cent of all of cyclists on major built-up roads wear helmets, although 94 per cent of child cyclists currently do not wear helmets on minor roads and public open spaces.⁵ Greater London appears to have one of the highest cycle helmet wearing rates in Great Britain, and from almost zero in the mid 1980s, helmet use in the capital on the roads rose to around 40 per cent by 1996, and was 50 per cent by 2000. The latest Bill has been sponsored by the Bicycle Helmet Initiative Trust, set up by Angela Lee, a nurse who specialises in paediatrics. Her claim is that she has seen ‘time and time again the absolute devastation caused [to] children with head injuries who have had accidents on their bikes when they haven’t been wearing a helmet.’⁶ The Formula One motor racing driver David Coulthard, who is the patron of the Bicycle Helmet Initiative Trust, indicated in 2002 that his eventual aim is to make all cyclists wear helmets.⁷

In the opposing camp are the British Medical Association and the Royal College of General Practitioners, stating that the health benefits of cycling far outweigh any risks involved, as helmet compulsion reduces cycling, and therefore leads to obesity and related illnesses; the car-dependent sedentary lifestyle would appear to be a far

⁴ Figures have been falling. In 1995 fatalities numbered 213. Cycle use in the UK has increased by 10 per cent since 1993, but the rate of reported pedal casualties has decreased by more than 34 per cent over the same period. In London, cycle use has risen by 30 per cent since the introduction of the congestion charge in 2003, while casualties have fallen by 17 per cent; Simon O’Hagan, ‘Off with their helmets’, *Independent on Sunday* (25 January 2004).

⁵ Surveys showed 16 per cent in 1994, 17.6 per cent in 1996, and 21.8 per cent in 1999. The increase has been in adult helmet use, with little or no change in wearing rates among children; Elizabeth Towner, Therese Dowswell, Matthew Burkes, Heather Dickinson, John Towner, Michael Hayes, *Bicycle helmets: a review of effectiveness* (No. 30, 2002). See also the RoSPA website at http://www.rospa.com/cms/STORE/Road%20Safety/cycling_files/cycling.htm

⁶ *Yorkshire Post* (23 March 2004). Ms Lee claims that ‘research ... shows [helmets] reduce head injuries by 88 per cent - that is a definite figure from research which has never been discredited’; see her article about setting up the Trust in *The Guardian* (1 April 1998).

⁷ ‘Helmet-law MP accuses ACT of being “cycling fascists”’; Association of Cycle Traders <http://www.bikebiz.co.uk/daily-news/article> (5 April 2004). Eric Martlew also allegedly accused an opponent of helmet compulsion for children as ‘more interested in selling bikes than saving lives’; *The Guardian* (2 April 2004).

greater threat to children.⁸ All the major cycling organisations have also lined up with their own scientific analysis, suggesting that ‘people who cycle regularly have lower incidences of cardiovascular disease, stroke, diabetes, cancer, obesity and mental health problems’.⁹ Some of the pro-helmet lobby statistics have also been heavily criticised as sensationalist, particularly the claims in an Early Day Motion in 2002 proposed by Alan Meale MP that ‘approximately 28,000 children under the age of 16 years receive a serious head injury as a result of a cycling accident ...[and] that by simply wearing a bicycle helmet 85 per cent of such head injuries could be prevented’.¹⁰ The figure of 28,000 ‘serious’ head injuries is actually for all head injuries from any source, the vast majority resulting from trips and falls, whereas the correct figure for cycling injuries is 1,200, and of these the vast majority do not require a hospital stay and have no lasting consequences. Similarly the statistic that cycle helmets prevent 85 per cent of head injuries has been shown to be a large exaggeration and has been withdrawn; a recalculation from the same data showed the protective benefits of helmets to be so low as to be statistically insignificant.¹¹ However, with a previous attempt by Jean Corston MP to introduce a Ten Minute Rule Bill in 1999, half a dozen Early Day Motions on the topic in recent years, and the Horses (Protective Headgear for Young Riders) Act 1990 as a legislative model, this looks likely to be a long-running debate in Parliament.¹²

However, the proposed legislation is in the realm of criminal liability for the parent. What about the implications in the parallel universe of tortious liability? As

⁸ The comparable figure to the 133 cyclist deaths in 2002 is 58,000 deaths of coronary heart disease attributable to inactivity. See for some of the early debate ‘Cycle helmets and the law’, *BMJ* editorial (11 June 1994), and the letter ‘Cycle helmets deter people from cycling’, *BMJ* (20 August 1994).

⁹ Briefing by the Cyclists Touring Club (23 December 2003), <http://www.ctc.org.uk/working/HELMETS.aspx>

¹⁰ This EDM in 2002 also ‘commends the excellent campaign of the Bicycle Helmet Initiative Trust to get Parliament to introduce legislation to enforce the wearing of helmets by all bicyclists in the UK’; EDM 1983, entitled Bicycle Helmet Initiative Trust, proposed by Alan Meale MP.

¹¹ The original ‘85 per cent’ claim was in R.S.Thompson, F.P.Rivara and D.C.Thompson, *New England Journal of Medicine* 1989, vol 320 No 21 p1361-7, but see a critique at <http://www.cyclehelmets.org/papers> which has a full analysis of all the arguments against compulsory helmet use.

¹² See for an excellent review of the issues, House of Commons Research Paper 04/29 (31 March 2004).

with car safety belts and motorcycle helmets legislation from a previous era, there is inevitably a close relationship between possible compulsion in a criminal statute and ongoing civil litigation for personal injury on the roads. Indeed, in both the earlier instances the civil courts did not wait for legislative regulation on the compulsory use of safety belts or motorcycle helmets, but commenced to deduct damages for contributory negligence when they determined the evidence was compelling. What therefore should be the response of the civil courts when faced with a tort claim from an injured cyclist, when the defendant argues that they assumed a risk in not wearing a cycle helmet? The Court of Appeal recently came very close to a pronouncement on this question in 2003 in the case of *Drinkall v Whitwood*,¹³ now on appeal. That case involved a preliminary issue on a technical matter of procedure, which was the withdrawal of the defendants from an agreed settlement. But this withdrawal was on the basis that the defendants wished to argue for a higher percentage of contributory negligence about the non-use of a cycle helmet. A 20 per cent reduction had already been agreed as a deduction, and the insurers were now arguing for 25 per cent. Indeed, that ‘quarter deduction’ is now becoming a standard response in cycling injury cases when a helmet has not been worn by an injured cyclist, so it can only be a matter of time before the issue requires full judicial resolution. Lessons should therefore be learned in advance from a proper analysis of the precedents on safety belts and motorcycle helmets, as an automatic 25 per cent reduction is not what the landmark decision of *Froom v Butcher*¹⁴ determined in 1975. However, it is also very important to point out that when the Court of Appeal reduced damages in that case for a driver not wearing a seat belt and being injured as a result, this was well before 1983 when

¹³ *The Times* (13 November 2003), [2003] EWCA Civ 1547.

¹⁴ *Froom and others v Butcher* [1976] QB 286, [1975] 3 All ER 520, [1975] 3 WLR 379, [1975] 2 Lloyd’s Rep 478, [1975] RTR 518.

Parliament legislated to make front seat belts compulsory.¹⁵ In addition, it is vital for the courts to consider dispassionately the conflicting arguments of cycle helmet usage, separating out the realities from the mythologies. Our knowledge of the full context of road safety has moved on apace in recent years, and the full context of hazard, risk, and social as well as financial cost is important to bear in mind.

***Drinkall v Whitwood* and the other recent cycle helmet cases**

Kerry Drinkall's case is a procedural skirmish based on the Civil Procedure Rules, which stipulate that a settlement involving a minor must be made 'with the approval of the court'.¹⁶ Cycling home from school in 1998, aged 14, the claimant was in collision with a motor vehicle driven by the defendant, Dean Whitwood. She was left with some permanent brain damage. Before proceedings were issued, the claimant's solicitors, acting for her mother as litigation friend, made an offer to settle the case on the basis of a 20 per cent reduction for contributory negligence. It is therefore very important to note that these solicitors, *acting on behalf of the claimant*, in common with many others, routinely proposed a discount for a failure to wear a cycle helmet, in this case a figure of 20 per cent. While it is not possible to have a full survey of all such non-litigated cases in the settlement process, it would appear that defendants and their insurers respond, as they did in this case, with a semi-automatic deduction of 25 per cent. The reason for litigation here was that claimant's offer in *Drinkall v Whitwood* was accepted immediately by the defendant's insurers in April 2000, but 18 months later, just 22 days short of the claimant attaining her age of majority on her 18th birthday, the defendant withdrew from the settlement, with the express aim, as Simon Brown LJ noted, of 'contending for a higher degree of contributory negligence

¹⁵ Motor Vehicles (Wearing of Seat Belts) Regulations 1982 (S.I. 1982 No. 1203), in force on 31 January 1983. See now section 14 Road Traffic Act 1988, and The Motor Vehicles (Wearing of Seat Belts) Regulations 1993 (S.I. 1993 No. 176). Note also the seat belt directive, 16 December 1991 (No. 91/671/EEC).

¹⁶ rule 21.10 of the Civil Procedure Rules.

because the claimant had not been wearing a cyclist's helmet'.¹⁷ The issue as to whether there had been a valid agreement was then tried as a preliminary issue, so the cycle helmet matter forms the background context, but is not part of the decision. Judge Glentworth decided that the 80:20 agreement was valid, and that what the defendant was seeking to do was to 'use the protection given to minors to resile from an agreement'. However, the Court of Appeal looked at an earlier decision of the House of Lords in *Dietz v Lennig Chemicals Ltd*¹⁸ which was on materially identical rules,¹⁹ and held that this precedent was decisive on *Drinkall v Whitwood*. Simon Brown LJ commented that, 'regrettable though it might seem, the defendants here were entitled to renege on their agreement as they did, for good reason or none.'²⁰ The 'good reason' was of course an attempt to go up above the 20 per cent reduction already agreed for the absence of a cycle helmet.

Very few tort cases are litigated, so that the settlement process is determinative of 99 per cent of personal injury cases. Much in the twilight world of settlement negotiation is unclear, but it would appear that the defendant's insurers, AGF Limited, came to a view that a discount of 20 per cent was too low for failure to wear a cycle helmet and countermanded their solicitors.²¹ Research suggests that, routinely, there has been a tendency to reduce damages by a quarter when a cyclist was not wearing a helmet. It is suggested that this cannot be right or just, as so much depends on the circumstances. However, in analysing the settlement process, and cases in coroner's courts, it would appear that cycle helmet wear is also becoming a kind of preliminary

¹⁷ *Drinkall v Whitwood* [2003] EWCA Civ 1547.

¹⁸ [1969] 1 AC 170. *Dietz v Lennig Chemicals* concerned a widow who had agreed a settlement both for her and her infant son 'subject to the approval of the court', and then unknown to either of the solicitors involved, re-married. The settlement was set aside at the request of the defendant in the light of the new circumstances. See for a view that such settlements give 'extraordinary generosity' and over-compensation, Peter Cane, *Atiyah's Compensation and the Law* (London: Butterworths, 6th edition) p. 113.

¹⁹ R.S.C. Order 80, rules 11 and 12.

²⁰ [2003] EWCA Civ 1547.

²¹ 'Cycle hat rule blow to payout', *Scunthorpe Evening Telegraph* (13 November 2003). See also the short law report in *The Times* 'Reneging on minor's partial settlement' at (13 November 2003).

legal litmus test in cycle compensation cases. Such a view wholly ignores the critical issue of causation. For example, in Greater London, over 50 per cent of cycling fatalities are caused by large vehicles turning left at junctions; no cycle helmet could possibly assist when being run over by a juggernaut failing to see a cyclist on the inside.²² An automated response that the absence of a cycle helmet might be a causative factor ignores reality on the roads.

It would appear that many personal injury lawyers, insurers and coroners are focussing on the peripheral question of helmet wear, rather than examining the cause of the vast majority of accidents involving cyclists – the negligent driving of a motor vehicle. Further research indicates, for example, that Mr Whitworth, aged 21, was sentenced at Scunthorpe Magistrates Court for driving with an illegal tyre, and fined £30, having his licence endorsed with three penalty points in 1998.²³ Without examining the full circumstances of that collision it would not be possible to ascribe sole fault to the vehicle driver on that occasion, but in the vast majority of road collisions world-wide the literature notes that ‘driver error’ is the key component. Drivers can become distracted, fatigued and overstressed, and so can cyclists. But the consequences are often very different. The estimate in countless studies is the ‘90 per cent rule’, in that poor driving habits account for 90 percent of all collisions on the road. Police investigators no longer use the term ‘accident’ in connection with road offences, because the causes are so familiar and are not ‘accidental’. They prefer the word ‘collision’ or perhaps, ‘incident’. It is also clear that ‘crashes’, another somewhat loaded word, are usually the result of a driver taking a decision to break the law, for example by overtaking at a dangerous place such as at a junction or on the

²² Cyclists are thirty times more likely to be killed by a heavy goods vehicle than a car in London. The study by public health experts in Camden and Islington discovered that lorries, trucks and buses were implicated in two-thirds of the 178 cycle deaths in Greater London between 1985 and 1992; *British Medical Journal* (1994), quoted in the *Evening Standard* (27 June 1994).

²³ Scunthorpe Evening Telegraph (22 July 1998).

brow of a hill, crossing double lines, speeding, jumping red traffic lights, using a mobile phone while driving, and a catalogue of other road traffic offences. Not far from Scunthorpe was the scene of the Selby rail disaster, actually the largest claim for *motor negligence* ever, where Gary Hart was jailed for five years for causing the deaths of ten people on the London-bound express train in 2001, after falling asleep at the wheel. Mackay J told Hart that because of his arrogance in setting off on a long journey without sleep, he had caused ‘the worst driving-related accident in the UK in recent years’.²⁴ Alcohol is another straightforward factor, estimated to be the cause of nearly 2,000 road deaths in Britain every year, or 40 per cent of all road fatalities. 8,000 drivers each month are convicted of drink driving, with increasingly stringent sentencing on drunk drivers.²⁵ One notorious case was that of Peter Noble, described by Judge Goldsack as having been on a ‘motorised pub crawl’, who had been seen driving at speeds up to 80mph moments before a fatal accident and then fled the scene after being cut from the wreckage. He had three previous bans for drink driving offences. He showed no remorse in court, initially identified one of his dead passengers as the driver and denied the six charges of causing death by dangerous driving. He also claimed that the amount of alcohol he had drunk had nothing to do with the crash and blamed water on the road for causing his vehicle to skid. Keene LJ indicated in the Court of Appeal that ‘So far as this court can discover, this case involves the highest number of deaths that have arisen from a single piece of dangerous driving ... It is difficult realistically, in our judgment, to imagine a worse case.’²⁶ Most cases relate of course to ‘carelessness’ or negligence, equivalent to the tort standard enunciated by the Court of Appeal in *Nettleship v Weston*²⁷. But there

²⁴ *The Times* (12 January 2002).

²⁵ ‘Record sentence for 13-pint driver who killed six’, *The Times* 8 March 2001.

²⁶ However, the sentence was cut on appeal from 15 years to 10 years; *Daily Mail* (25 June 2002). *R v Noble* [2002] EWCA Crim 1713, [2003] RTR 115.

²⁷ *Nettleship v Weston* [1971] 2 QB 691, [1971] 3 All ER 581, [1971] 3 WLR 370, [1971] RTR 425.

can still be tragic results from momentary inattention, such as the case of Dr. Thomas Munch-Petersen, the UCL lecturer who was sentenced to 90 days imprisonment after a conviction for causing death by dangerous driving, when he leaned over to get a mint from his jacket while overtaking on the M1 at 70mph, and killed three people.²⁸ This context of ‘90 per cent driver error’ is therefore the backdrop for the vast majority of injuries on the roads. In any collision with a motor vehicle, it is quite clear that pedestrians and cyclists are susceptible to serious injury. As the Department for Transport points out in their advice note *Drive Safe, Cycle Safe* in 2003: ‘Cyclists are more vulnerable than motorists - drivers have the major responsibility to take care’. The Department’s latest figures, for 2002, show that 130 pedal cyclists were killed, and 2,320 were seriously injured on the roads in the UK.²⁹ But as Mayer Hillman points out: ‘the safest forms of travel are walking and cycling ... cycling isn’t dangerous, cyclists are vulnerable’.³⁰

When the civil courts come to deal with any road injuries, the settlement process is greatly more important than the court decision-making. To get to grips with this highly secretive and ‘intuitive’ process is also difficult. The Royal Commission chaired by Lord Pearson estimated from various surveys that 86 per cent of cases are settled without the launch of proceedings, 11 per cent before the case is set down, and 2 per cent at the ‘door of the court’, leaving just 1 per cent to be disposed of by trial.³¹ Many other surveys confirm this general pattern. While the decided cases are the ‘tip of an iceberg’, their findings are fed back into the settlement process, which has become an administrative factory, now moving more to computer systems such as

²⁸ See the interview in *The Times* (30 October 2001) and the subsequent book, Thomas Munch-Petersen, *Fatal Error: Confessions of an accidental killer* (London: Short, 2003).

²⁹ See generally <http://www.dft.gov.uk/> See also publications of the former Department for the Environment, Transport and the Regions, such as *Tomorrow’s roads: safer for everyone* (2000).

³⁰ ‘Road Safety: The New Philosophy’, which first appeared in *Inroads*, Journal of the Institute of Road Safety Officers, in 1995, and now on http://ourworld.compuserve.com/homepages/traffic_safety/mayer.htm

³¹ Vol 2, Table 124, Royal Commission on *Civil Liability and Compensation for Personal Injury*, HMSO, Cmnd.7054-I, 1978.

‘Colossus’ where data input is handled by relatively low-level clerical officers in insurance firms, rather than being analysed by lawyers.³² It is here that the ‘quarter deduction’ appears to have become a standard for any claimant not wearing a cycle helmet, and without a considered appellate decision to the contrary, there will continue to be an habitual reduction of damages for failure to wear a helmet. The settlement process of course adjusts occasionally when there is a contested case which brings an issue momentarily into the public arena, but insurance companies are very adept at keeping such issues away from courtrooms, particularly if they feel they have a serious adversary or the circumstances are likely to produce an unfavourable finding from their perspective; they are of course organisations that are in business to make a profit.

Some instances of unreported cases other than *Drinkall v Whitwood* have also ‘lifted the veil’ on contributory negligence and cycle helmets, and it is only a matter of time before a full pronouncement on this issue. The first unreported case to see the light of day can be seen in the somewhat unusual source of a press release from a set of barristers’ chambers in Liverpool. In *Williams v Ashley* the insurers abandoned their claim for contributory negligence, for failure to wear a cycle helmet, just moments before trial. Counsel involved included Bill Braithwaite QC, consultant editor of *Kemp & Kemp*.³³ A very interesting *obiter* point is that this particular judge subsequently remarked that ‘it was not surprising that those allegations should be abandoned’, suggesting that had that not been the case, the judge may well have ruled in the cyclist’s favour.³⁴ Another very interesting factor was the intervention of the Royal Society for the Prevention of Accidents (RoSPA), who produced a detailed

³² See David Person, *Facing Colossus: Insurance Claims, Constructive Bargaining and Personal Injury Settlements* (unpublished PhD thesis, 2003). See generally Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford: Clarendon, 1987).

³³ *Damages for Personal Injury and Death*, the leading practitioner’s text.

³⁴ *Brian Williams v Jacqueline Ashley*, Press Release from Exchange Chambers, Liverpool, EC/09/99 (17th November 1999); Judge Rogers QC, sitting as a Deputy High Court Judge.

report for the defendants. RoSPA has a policy to recommend that all cyclists wear a helmet, because in their view ‘cycle helmets, when correctly worn, are effective in reducing the risk of receiving major head or brain injuries in an accident’; however, they do also make the countervailing point that ‘The most effective ways of reducing cyclist accidents and casualties are to improve the behaviour of drivers, improve the behaviour of cyclists and to provide safer cycling environments.’³⁵ Brian Williams, the claimant in this case, was seriously injured in 1996, and his case came on for trial of liability in 1999. He had been cycling along a minor country road in North Wales when Ms Ashley drove her car up to a junction, and then drove straight out without stopping. The claimant had no recollection of the accident, and suffered brain damage, but an independent witness disputed the defendant’s denial of careless driving, although coupled with an accusation that the claimant was himself negligent by riding too fast, with his head down, and not looking where he was going. However, the two major allegations of contributory negligence were that the claimant failed to wear a cycle helmet, and failed to wear fluorescent or conspicuous clothing. The claimant’s expert witness, Dr Nigel Mills, formerly chaired the British Standards Institution committee for motorcycle helmets in January 1994, and has been a member of the umbrella committee which oversees all helmet committees. His conclusions are very noteworthy: helmets are less effective when a cyclist hits a vehicle than when they simply hit the road; helmets do not eliminate injury; serious brain injury is quite common when cyclists are hit a glancing blow by a vehicle, as distinct from a direct collision; the site of the impact on the right side of the face would not have been protected by a helmet; and the claimant’s head injury was due to the right side of his

³⁵ RoSPA does not believe that it is practical to make the use of cycle helmets mandatory ‘because voluntary wearing rates are too low’, but it indicates that ‘There may be stronger arguments for limiting mandatory cycle helmet use to child (rather than all) cyclists.’ See generally http://www.rospa.com/cms/STORE/Road%20Safety/cycling_files/cycling.htm

face hitting the road, so a helmet would not have reduced his injuries.³⁶ The defendant's 26 page report from RoSPA appeared to support the proposition that in 1996 it was negligent not to wear a helmet when cycling, and that it was also negligent to wear inconspicuous clothing. An offer was made to settle at 80 per cent of full liability, but that was rejected. There was then a further Part 36 offer for 90 per cent, and that too was rejected. Inevitably, many cyclists would be under great pressure to settle on this discount basis, lacking serious legal assistance. However, with just two days to go, the defendant abandoned the allegation of failure to wear conspicuous clothing, and with five minutes to go, the defendant abandoned the helmet issue.

Two further cases, both fought by the Cyclists' Touring Club (CTC), attracted massive campaigns against an automatic deduction for contributory negligence when not wearing a cycle helmet. The CTC, founded in 1878 and the UK's national cycling organisation, provides legal advice for its members. The first case forced Provident Insurance to retract a claim of contributory negligence against Darren Coombs in 2001. Aged 8 at the time he was run into by a car on the Isle of Wight in 1997, and the defendants initially suggested that he should have been both wearing a helmet and should not have been allowed out unsupervised. Judge Thompson QC, concluded: 'There was no degree of contributory negligence to attach to the young cyclist.'³⁷ We also know some of the details of this matter, as the case went to the Court of Appeal, but on the grounds that the judge should not have accepted the testimony of an

³⁶ This facial impact injury was the probability when Fabio Casartelli died in the 1995 Tour de France, sparking a worldwide debate on cycle helmets in the popular press. Casartelli struck his head on a solid concrete block positioned at the side of the road, and the Tour's doctor, Gerard Porte, stated categorically that Casartelli fell on his face. A postmortem examination by Michel Disteldorf on behalf of the coroner in Tarbes suggested that the impact was on the top of the skull and a helmet might have prevented some injury; 'The hard truth behind a waste of life', *Sunday Times* (23 July 1995). The World Health Organization helmet campaign attempts to draw the contrast between crashes in the Tour de France, one involving Chris Boardman with a helmet, and Fabio Casartelli without a helmet, both receiving blows to the side of the face; see the photos and discussion at <http://www.sph.emory.edu/Helmets/>

³⁷ Copy of CTC press release, 2001. As a result of the Coombs case, the CTC set up a Cyclists Defence Fund in 2001 to help resist threats to the rights of cyclists.

eyewitness, Mrs Goudie, who was standing a bus stop and whose evidence was that the driver strayed into a bus lay-by where her car struck the cyclist; this seemed at variance with the ‘dumb evidence’ of the police investigators, who formed the view that the cyclist was ‘wholly to blame’, but the judge had not allowed them to give expert evidence at the trial. It was clear that the cyclist’s head had struck and shattered the windscreen, but opinions varied as to how this had happened, with Tuckey LJ suggesting about the driver that it was ‘possible that she was distracted by one of her children, although that was pure speculation’. However, the Court of Appeal affirmed the judge’s findings, saying that they had no reason to overturn his view that ‘Mrs Goudie was a good, impressive and reliable witness who had a grandstand view of the accident and who had given a consistent account of what she saw without reconstruction or invention’³⁸

This was followed in 2002 by the case of a Walsall cyclist, Alan Millett, who suffered serious head injuries when he was hit by a car on a roundabout. The insurers, NIG (the National Insurance and Guarantee Corporation), proposed a reduction for contributory negligence of 15 per cent for the sole reason that Mr Millett was not wearing a cycle helmet, but later backed down in the face of a massive campaign of letter and emails from CTC members.³⁹

In 2003 the leading firm of personal injury experts, Irwin Mitchell, were able to make a structured settlement of £5 million for Richard Harrison, who was hit by a car near his home at Hexham in 1999, after the Royal Sun Alliance dropped their attempt to deduct for contributory negligence as he was ‘riding bareheaded’. His father was

³⁸ *Coombs v Bennett* [2002] EWCA Civ 1674.

³⁹ See the CTC press release (14th November 2002). Mr Millett’s solicitor Joseph Rahm was quoted as saying that ‘The considerable discontent CTC members showed led NIG to back down very quickly. When it comes to protective head gear, insurers know they are on a poor wicket and that there is no proof that the head injury would have been lessened by the wearing of a helmet.’

quoted as saying that this had been ‘a long, exhausting process’.⁴⁰ Many injuries to cyclists could not under any circumstances be ascribed as remotely affected by the wearing or absence of a cycle helmet. This is the central issue in tort cases of causation. For example, Stephen Brown died in 2004 while cycling home from work, after being hit from the rear by a man who had been driving for 12 years without a licence, MoT certificate or car insurance. This was despite, according to the coroner, wearing a fluorescent jacket and the day being one of ‘perfect’ driving conditions. Mr Brown was not wearing a helmet, but this would obviously have made no difference at all.⁴¹ Similarly the Court of Appeal Criminal Division has had to deal recently with a coach driver who had ‘little or no sight in his right eye and significant impairment of sight in his left eye ...and failed to see a cyclist’; Judge LJ commented significantly that ‘The cyclist had been riding appropriately with yellow jacket, helmet and lights’, but although the court felt the sentence was unduly lenient for causing death by dangerous driving when sentenced to two years’ imprisonment suspended for two years, they exercised their discretion not to interfere with it.⁴²

As with many fatal accident cases, the inquest is an important preliminary step in both the civil and the criminal spheres. The coroners’ comments as to a cause of death can play a vital role in the settlement process, often precipitating an offer which disposes of the case. However, the coroner’s duties are fairly limited, as they are essentially determining whether there should be a postmortem, and there have been many

⁴⁰ *BBC News* (2 October 2003). See also the report at cyclingnews.com and in *Vehicular Cycling and Helmet News* (October 2003). The report at cyclingnews.com suggested that this was the third case of its kind in the UK where insurers had used a contributory negligence argument, and the third time the argument has been dropped and the case settled out of court.

⁴¹ The coroner said he would not record a verdict of unlawful killing as he was not satisfied beyond reasonable doubt that the driving was dangerous and recorded a verdict of accidental death from multiple injuries; *This is Cheshire* (24 March 2004).

⁴² *Attorney General’s Reference* (No 88 of 2003) [2004] All ER (D) 572. See the report in the *Liverpool Daily Post* (31 March 2004). A comparable case on sentencing was that of five years handed down by Judge Mellor at Norwich Crown Court on a motorist who ran over a cyclist, Kenneth Stokes, taking part in a time trial, despite ‘lights both at the rear and front of his cycle ... fluorescent clothing with a flashing light on his back’; *Birmingham Evening Mail* (25 January 2001).

criticisms of their role.⁴³ Given some of the sketchy information they necessarily have to go on, coroners are not always perhaps actually in a serious position to pronounce on the causality issue of cycle helmets; this does not necessarily stop them commenting. The reporting of such cases is not very systematic, but for example a coroner for Exeter and Greater Devon said in 2000, when Liudmila Dennis fell off her bicycle after clipping the wheel of a fellow cyclist on a steep hill: ‘I know she was not wearing a cycle helmet, none of you were. Whether if she had that would have saved her, I don’t know, but it is important to wear a helmet.’⁴⁴ Similarly the county coroner for Warwickshire recording a verdict of accidental death on Stephanie Warren, aged 12, cycling home from school urged all cyclists to wear helmets to avoid head injuries: ‘The head is very vulnerable, and I have unfortunately had several cases where quite a small impact has led to death or serious injury. I have absolutely no doubt that all cyclists should wear a helmet.’⁴⁵ A trawl through newspaper accounts on cases of motorists accused of causing the death of cyclists by dangerous driving sees a constant reference to whether or not they were wearing a helmet: for example, a taxi driver sentenced for ‘road rage ... particularly dangerous to do when the deceased was without a helmet,’⁴⁶ a white van driver sentenced for killing a banker who was ‘cautiously’ approaching the junction at the bottom of his road and ‘despite wearing a helmet,’⁴⁷ and a drunken driver who ran over three cyclists despite, as the

⁴³ See the refusal of the coroner to hold an inquest, when the family felt that work over many years exposed to asbestos dust as an asbestos moulder was ‘asbestos-related’ and therefore an ‘unnatural death’ requiring a full inquiry; Simon Brown LJ dismissed the application, because under section 19 of the Coroners Act 1988 a coroner’s duty was to ‘receive information, investigate and make a decision as to whether an inquest was unnecessary’; *Terry v East Sussex Coroner* [2001] EWCA Civ 1094, [2002] QB 312. See also *R v Poplar Coroner, Ex p Thomas* [1993] QB 610, 627.

⁴⁴ ‘Coroner’s cycle helmet plea after trail tragedy’, *North Devon Journal* (18 May 2000).

⁴⁵ ‘Girl’s death prompts cycle helmet warning’, *Rugby Advertiser* (27 November 2003). Mrs Warren said her daughter ‘had a helmet but didn’t wear it on the day of the accident. She added: ‘I watch these children coming home from school without their helmets. That’s what kids are like, they just don’t think helmets are ‘cool’.’

⁴⁶ ‘Taxi driver jailed over road rage death of cyclist’, *The Times* (9 November 1996), sentenced for four and a half years by Recorder John Milford QC for using his cab as a weapon in a ‘deliberately hostile piece of driving’.

⁴⁷ ‘Van driver gets 12 months for cyclist’s death’, *Evening Standard* (17 November 1999), sentenced by Judge Forrester for ‘an aggressive and impatient piece of overtaking’.

prosecutor remarked, ‘all wearing reflective clothing, helmets, and [having] on their bicycle lights as they rode along in single file on a fine evening’.⁴⁸

In reality the scientific jury is still out on the efficacy of cycle helmets, predominantly because cycle helmets would be a completely useless protection in such horrific situations. Robert Davis in *Death on the Streets: Car and the Mythology of Road Safety* claimed that bicycle helmet-wear had ‘become one of the major – if not the major – “road safety” issues of the 1990s ... [and yet] the beneficial effects of helmet-wear are minimal, non-existent, or even negative.’⁴⁹ We know that less than 50 per cent of cycle ‘accidents’ are collisions with other vehicles; so cyclists do just ‘fall off’ for a variety of reasons, but the pro-helmet campaigners are much too simplistic when they assert that ‘research has shown that wearing a good-quality cycle helmet is proved to reduce deaths from head injury’;⁵⁰ the research does not show that by any means. The correlation is by no means automatic. Cycle helmets are generally made of polystyrene and offer minimal protection. They are designed to withstand falls from a bike at no more than around 12mph. The first cycle racing helmet was evolved by the manufacturers Bell from a ski helmet in 1961, and the ‘first truly effective bicycle helmet - the Bell Biker’ was produced in 1975.⁵¹ And yet the semi-automatic implication of fault when a cyclist is not wearing a helmet, unscientific though it is, seems to be gathering currency. ‘Obviousness’ is not in reality apparent when the detail is studied.⁵² A helmet clearly cannot protect a cyclist from injury to

⁴⁸ ‘Seven years for drunk driver who left seven children fatherless’, *Daily Mail* (10 March 1998), sentenced by Judge Hodson for ‘thoroughly outrageous and irresponsible behaviour [which] killed three admirable and hardworking men and wrecked the lives of their loved ones’. The cyclists were two brothers and a brother-in-law. See also *The Guardian* (10 March 1998): the driver was three times over the drink driving limit.

⁴⁹ (London: Leading Edge Press, 1992); a critical point made by Robert Davis was that cycling fell by approximately 40 per cent in the Melbourne area in the first year following legislation in the State of Victoria in 1990.

⁵⁰ J H B Adams, Chief Executive, Head Injuries Trust For Scotland, *The Glasgow Herald* (24 July 1999).

⁵¹ See the history of Bell Sports at <http://www.bellbikehelmets.com/main/about/timeline.html>

⁵² See the useful corrective of the Australian High Court, who emphasised that ‘obviousness’ of the risk is only one of a number of factors which should be taken into account in determining the standard of care; *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9 at para 45, in a case where the claimant had suffered a serious eye

parts of the body other than the crown of the head, and therefore the simple fact of a victim not wearing a cycle helmet should not imply culpability, without a great deal further investigation.

Interestingly the scientific view seems to be paradoxical. For example, it is clear that the road users most at risk from head injury are pedestrians and young drivers, and not cyclists. In Great Britain, six times more pedestrians and eighteen times more motor vehicle occupants suffer lethal head injuries than cyclists. Children are 2.6 times more likely to suffer head injury through jumping and falling than by cycling, and more than 99 per cent of head injuries seen by UK hospitals do *not* involve road cyclists. It would therefore seem logical that helmets for motorists would be rather more effective than those for cyclists, and certainly more beneficial than seat belts, interior padding or air bags. The potential of car driver helmets for reducing injury is 17 times greater than that of cycle helmets.⁵³

In one cycling case in 2001 at the High Court in Newcastle, *A (a child) v Shorrock*, a QC tried repeatedly to persuade some neurosurgeons, and a technical expert, to state that one must logically be safer wearing a cycle helmet than without; all three refused to so agree, stating that they had seen severe brain damage and fatal injury both with and without cycle helmets being worn.⁵⁴ In their view, the performance of cycle helmets is much too complex a subject for such a sweeping claim to be made. In that case, a 14 year old cyclist doing a paper round lost, but on grounds other than anything to do with a cycle helmet – he had cycled into the path of a police officer driving slowly home. However, having heard the scientific evidence, Judge Brown made it clear that the claimant's failure to wear a cycle helmet did not amount to contributory negligence.⁵⁵ The view of Simon Holt, a solicitor who has over 30 years

injury when playing indoor cricket without the provision of a helmet.

⁵³ See generally <http://www.cyclehelmets.org> and the supporting scientific literature.

⁵⁴ Brian Walker, Head Protection Evaluations, March 2004, quoted at <http://www.cyclehelmets.org>

⁵⁵ *A (a child) vs Shorrock* (19 March 2001). See <http://www.cyclehelmets.org/1051.html>

experience in personal injury claims, and who formed CycleAid in 1988, is that ‘When there is a major impact, a cycle helmet offers little protection.’⁵⁶

What does seem clear, however, is that when cycle helmets are made compulsory, then cycling levels drop dramatically, particularly among teenagers. A study in 1998 at Newcastle University on perceptions of risk found that parents over-estimated the danger of their children being abducted, while ignoring simple road safety lessons; out of more than a thousand parents questioned, only 18 per cent would allow their child to go to the local park or play area alone, but 61 per cent said that they allowed their child to cycle without a helmet. However, the statistics they analysed showed that while 37 children were murdered, 204 died through road accidents in 1997.⁵⁷ It is of course very difficult for parents to get a proper balance between encouraging a spirit of adventure and the need to protect the health and safety of their children. And yet insisting on protective headgear for young cyclists in the neighbourhood may drastically cut the levels of cycling altogether. There is plenty of evidence showing that efforts to impose helmet-wearing are strongly linked to reductions in cycle use - particularly among teenagers - thereby eroding the huge range of health and other benefits that go with cycling. One imponderable here is ‘fashion’. Jean Corston MP, when introducing her Cyclists’ Helmets Bill in 1999 attempted to enlist the help of the pop band Boyzone, saying that ‘too many young people believed that helmets would give them a bad hair day, when in fact they saved lives’.⁵⁸ Two examples from Cornwall are representative of a huge discussion in newspaper columns and letter

⁵⁶ He quotes a neurosurgeon witness he has utilised who states ‘Most experienced trauma surgeons believe that cycle helmets give only very limited head protection’. Simon Holt also adds that it is his ‘experience that the defendant’s solicitors are abandoning allegations of contributory negligence for failure to wear cycle helmets, but that may be his individual experience because he determinedly fights every such effort! See his letter published in the May 2003 issue of *Bicycle Business*, and at <http://www.cyclehelmets.org/1054.html>

⁵⁷ Department of Community Child Health at Newcastle University, ‘Child abduction fears ‘unfounded’ - Youngsters more at risk from road traffic accidents’, *Newcastle Journal*, (10 August 1998).

⁵⁸ *The Times* (3 November 1999). See also *Western Daily Press* (3 November 1999): ‘Younger children were happy to wear helmets but as they grew older they began to dislike them’.

pages. Mattias Coleman, a 9-year-old, was riding his bike from his home in Truro to a playground when he was in collision with a taxi; he donated his helmet to the head injuries ward of the Royal Cornwall Hospital, where he recovered from concussion, but the evidence was that without it he would have died: ‘I’m shocked because if my mum didn’t make me wear my helmet I wouldn’t be here today... I looked in the mirror when I was wearing it and I thought I looked stupid but it doesn’t matter now - it saved my life.’⁵⁹ But not far away in Launceston, a 14-year-old ‘left home wearing the helmet to please his mother but hid it in a hedge as soon as he was out of sight ... because he did not want school friends to see him wearing it’; minutes later he died when struck a glancing blow by a van. The Coroner stated that ‘I hope other young cyclists who read about Christopher’s death will decide to wear helmets.’ The victim’s mother commented that ‘We don’t know whether the helmet would have protected him from the injuries, but perhaps he might have been seen sooner. It was a bright red helmet. It has been a trend around here not to wear helmets and Chris wanted to go along with that. It was peer pressure.’⁶⁰

This raises one feature of helmets, that they may provide an additional visual clue to drivers: gaudily coloured or with a reflective ‘halo band’ or with an LED light attached, a helmet can stand high as a warning beacon in urban traffic, prominent over the roof line of most cars. Perhaps not for nothing is the emblem and nickname of the Royal Signals Motor Cycle Display Team the ‘White Helmets’.⁶¹ Research from New Zealand has shown that motorcyclists who wear white helmets instead of black ones

⁵⁹ ‘Boy’s Life Saved By Cycle Helmet, *The West Briton* (10 October 2002). A senior house officer at the hospital was quoted as saying about cycle helmets, ‘Even if you don’t like the colour or anything, still wear it.’

⁶⁰ ‘Boy hid helmet before fatal crash’, *The Times* (30 July 1999). See also *Western Morning News* (29 July 1999). The four Cornish MPs who are Liberal Democrat have all campaigned for compulsory cycle helmets; Colin Breed, MP for South East Cornwall insists that ‘The lives of many child cyclists could be saved if cycle helmets became compulsory for under-16s’, and introduced an earlier EDM stating that ‘it is estimated that if cyclists are involved in an accident and are not wearing a helmet they are three times more likely to suffer a head injury than if a helmet had been worn’; ‘Helmets could save lives’, *Plymouth Evening Herald* (10 November 1998). The other Cornish Liberal Democrat MPs are Paul Tyler, Matthew Taylor and Andrew George.

⁶¹ Formed in 1927, this 32-strong team perform fire jumps, fast cross-overs and a pyramid featuring 22 soldiers on six bikes.

cut their risk of a serious crash by a quarter; similarly reflective and fluorescent clothing cuts the chance of death or serious injury by 37 per cent; and using headlights in daytime by 27 per cent.⁶² However, it is always very difficult to sort out the factors here; one medical commentator on this research suggests that motorcyclists ‘who feel safe wearing high visibility clothing and light helmets also ride in such a way that makes them less likely to crash’⁶³. This also raises Dr Mayer Hillman’s assertion of ‘risk compensation’ on cycle helmets: ‘Cyclists are less likely to ride cautiously when wearing a helmet owing to their feeling of increased security. In this way, they consume some, if not all, of the benefit that would otherwise accrue from wearing a helmet.’⁶⁴ This has sometimes been bowdlerised into a more extreme form of ‘Volvo effect’, or considering that a cycle helmet makes you feel ‘invincible’,⁶⁵ a word never used by Dr Hillman. However, it is very difficult for anyone to argue with Dr Hillman’s main hypothesis that ‘by wearing helmets, cyclists are *at best* only marginally reducing their chances of being fatally or seriously injured in a collision’. This is perhaps a counter-intuitive paradox, but the research shows that few fatalities and injuries can be prevented by cycle helmets being worn. Despite this study the Department for Transport deploys considerable expenditure to exert pressure for wider helmet usage; for example, their information leaflet *Cycle Safe: Tips for Safer Cycling* starts its discussion with a logo of a cyclist in a helmet and follows with an opening passage entitled ‘Wear a Helmet’. Such an approach is obviously likely to be

⁶² Susan Wells et al, ‘Motorcycle rider conspicuity and crash related injury: case-control study’ *British Medical Journal* (23 January 2004). See also *Motorcycle Roadcraft. The Police Rider’s handbook* (London: Coyne, 1996). Note now rule 69 of the Highway Code for motorcyclists: ‘Daylight Riding. Make yourself as visible as possible from the side as well as the front and rear. You could wear a white or brightly coloured helmet. Wear fluorescent clothing or strips. Dipped headlights, even in good daylight, may also make you more conspicuous’.

⁶³ Peter M Brindle, General practitioner, *BMJ Rapid Response* (15 April 2004).

⁶⁴ See generally Mayer Hillman, *Cycle helmets: the case for a against* (London: Policy Studies Institute, No. 752, 1993). See also Gregory B. Rodgers, ‘Bicyclist Risks and Helmet Usage Patterns: An Analysis of Compensatory Behavior in a Risky Recreational Activity’, *Managerial and Decision Economics*, Vol. 17, No. 5, Special Issue: Product Safety and Managerial Decisions, (1996), pp. 493-507.

⁶⁵ A word never used by Dr Hillman, but suggested by D.C. Thompson, F.P Rivara, and R. Thompson, *Helmets for preventing head and facial injuries in bicyclists* (Oxford: Cochrane Collaboration, 2000). See the rebuttal letter by Professor John Adams and Dr Mayer Hillman in the *BMJ* (28 April 2001).

endorsed by the manufacturers of helmets, and indeed a leaflet produced by them is widely available in British schools too. Many cyclists will no doubt wish to wear a helmet. There is some, though not much, scientific evidence that it can protect a cyclist in the rare ‘swallow dive’ fall on to the top of their head. But on no account should the absence of a cycle helmet be used as an automatic penalty reduction for the damages of a cyclist involved in an accident. A detailed forensic examination will be necessary on every occasion to ensure justice rather than the reflex cut in compensation.

The background context of tort case law on safety belts and motorcycle helmets

The main legal mechanism for reducing damages is the doctrine of contributory negligence.⁶⁶ It is a standard line of defence in many tort cases where an injured victim is claiming compensation. Where the ‘sole cause of damage’ is the claimant’s default, then they will recover nothing, but after the Law Reform (Contributory Negligence) Act 1945 damages can be apportioned according to the degree of fault. Up until 1945 it was an absolute defence to show any ‘contribution’ at all on the part of the claimant, and only subsequently was it possible to determine a case on the basis of a percentage liability: the damages ‘recoverable in respect thereof shall be reduced to such an extent as the Court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage’.⁶⁷ Note that this is not a share in the blame for the injury, but ‘share ... in the damage’.⁶⁸ However, as stated in a classic

⁶⁶ See the American Law Institute Restatement of the Law of Torts, where it is stated that a plaintiff’s contributory negligence may consist in an intentional and unreasonable exposure of himself to danger created by the defendant’s negligence, of which danger the plaintiff knows or has reason to know; American Law Institute, *Restatement of the Law, Second, Torts* (1965) vol 2, s 466.

⁶⁷ Section 1 (1) Law Reform (Contributory Negligence) Act 1945.

⁶⁸ *Ibid.*

judgment ‘one person being in fault will not dispense with another’s using ordinary care for himself’.⁶⁹

Contributory negligence is not the only defence in this area, as the high watermark of this type of defence is to allege that the plaintiff ‘assumed a risk’ and was *volenti non fit injuria* (No injury is done to one who consents).⁷⁰ In the *volenti* defence, the claimant is fully aware of the risk and has willingly accepted it. Lord Phillips of Worth Matravers MR in the recent case of *Donoghue v Folkestone Properties* had to deal with an expert diver who, after at least five pints of beer on Boxing Day, went for a midnight swim off the harbour slipway, diving into shallow water, and was rendered tetraplaegic. This near-suicidal behaviour led to a finding that no duty was owed to him, so the cases can be viewed either in the light of no duty owed, or of *volenti*.⁷¹ Similarly a trespasser who intentionally crosses over barricades and locked gates must be taken to assume the full ‘normal’ risks, and be the ‘author of his own misfortune’.⁷²

In the USA some helmet cases are met with this ‘assumption of risk’ defence⁷³, and in the UK it seems to be proposed from time to time in respect of negligent drivers; however in modern circumstances the *volenti* rule only operates when there is near-suicidal risk-taking, and has also been excluded from passenger cases by legislation. On the historical side, Lord Denning for example in *Nettleship v Weston*

⁶⁹ per Ellenborough CJ in *Butterfield v Forrester* (1809) 11 East 60. See generally Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stevens, 1951); the sub-title denotes it as a ‘study of concurrent fault’.

⁷⁰ ‘The maxim cannot be taken literally, and like other Latin maxims is apt to mislead. It represents the self-evident axiom that one who consents to injury cannot be heard to complain of it thereafter’; *Clerk & Lindsell Torts* (London: Sweet & Maxwell, 16th edition 1989) 1-159.

⁷¹ That case was in the discrete area of Occupiers’ Liability, which preserves a *volenti* defence for lawful visitors in section 2(5) OLA 1957, that ‘The common duty of care does not impose upon an occupier any obligation willingly accepted as his by the visitor’. See also *Tomlinson v Congleton BC* [2003] 3 All ER 1122, [2004] 1 AC 46 where the House of Lords dismissed a claim from a claimant who had dived into a lake in a country park, and was held to be a trespasser to whom no duty of care was owed under the OLA 1984, but see the dissenting speech of Lord Scott of Foscote that Mr Tomlinson was still a lawful visitor but that *volenti* applied.

⁷² *Ratcliff v McConnell* [1999] 1 WLR 670. Lord Hoffmann indicates approval for *Ratcliff v McConnell* in *Tomlinson v Congleton BC*, although he makes an important distinction: Mr Tomlinson’s ‘dive’ off the beach at Congleton was a ‘relatively minor act of carelessness. It came nowhere near the stupidity of Luke Ratcliff,’ at 1140.

⁷³ See for some interesting observations on helmets and US sports cases, Stephen D. Sugarman, ‘Assumption of Risk’, (The Monsanto Lecture), 31 *Valparaiso University Law Review* 833 (1997).

indicated that ‘In former times this defence was used almost as an alternative defence to contributory negligence. Either defence defeated the action. Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of *volenti non fit injuria* has been closely considered, and, in consequence, it has been severely limited.’⁷⁴ Knowledge of a risk of injury is not enough, nor is a willingness to take that risk, so nothing short of an express intention to waive any rights would seem appropriate. For example, in *Morris v Murray*⁷⁵ the Court of Appeal had to deal with some roistering friends on a pub crawl, followed by a ‘drunken escapade heavily fraught with danger’ in a light aircraft, on a day when flying lessons had been cancelled because of poor weather conditions. The flight was ‘short and chaotic’ and the inevitable disaster occurred. But a personal injuries claim by the passenger was eventually thrown out because he had consented to go on this crazed flight with the drunken pilot. The judge at first instance, Judge Rice, adopted the more merciful course of determining 50 per cent contributory negligence for the claimant, but the Court of Appeal overturned that decision and said that the passenger was *volenti*; he had known that the pilot was drunk. Mr Murray had a blood alcohol content equivalent to 17 whiskies, and that concentration of alcohol was more than three times the limit permitted for a car driver. Other near-suicidal *volenti* cases include not retiring a safe distance in a quarry when passing electricity through detonators;⁷⁶ suggesting someone ‘have a go’ with a sledgehammer when confronted with a live shell left over from the war;⁷⁷ and clambering over a cliff-top fence outside a social club at a seaside leisure camp.⁷⁸ There are many such cases in the USA, but

⁷⁴ *Nettleship v Weston* [1971] 2 QB 691, [1971] 3 All ER 581, [1971] 3 WLR 370, [1971] RTR 425.

⁷⁵ [1991] 2 QB 6, [1990] 3 All ER 801, [1990] 2 WLR 195.

⁷⁶ *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999, [1964] 3 WLR 329. When asked why he did not wait 10 minutes for further wire to be brought by the assistant, George Shatwell said his ‘only excuse was that he could not be bothered to wait’; per Lord Reid.

⁷⁷ *O’Reilly v National Rail and Tramway Applicances* [1966] 1 All ER 499, although the case actually turned on the related issue of vicarious liability, with Nield J holding that the claimant was on a ‘frolic of his own’ outside the course of employment for vicarious liability.

⁷⁸ *Munro v Porthkerry Park Holiday Estates Lt*, *The Times* (9 March 1984).

perhaps one of the most comprehensive demonstrations of an ‘assumption of risk’ is the Federal case of *Gard v. U.S.*, where three Californian students, returning home from a trip to Nevada, saw the remains of an old mine approximately 200 yards from the highway. Descending a horizontal shaft with one flashlight between them, the claimant fell into a vertical shaft and became tetraplaegic.⁷⁹

The position on travelling with a drunk driver has changed since the famous case of *Dann v Hamilton*⁸⁰, where a passenger took a lift with the driver of a car who was obviously under the influence, to see the Coronation decorations in 1937. Asquith J held that the maxim *volenti non fit injuria* had no application to the case; and he gave judgment in favour of the injured passenger.⁸¹ Subsequently section 149 of the Road Traffic Act 1972⁸² prevents the defence of *volenti* whatever the ‘antecedent agreement’ between passenger and driver.

The second line of defence behind the *volenti* rule is the doctrine of contributory negligence. As we have seen in *Morris v Murray*, a judge originally reduced the damages for the injured passenger by 50 per cent, but the Court of Appeal then extinguished the damages altogether. Although judges have complete discretion on the amount of reduction, adopting the time-honoured formula that the reduction must be ‘according to the circumstances of each cases’, there is often a tariff approach. This going-rate reduction can sometimes be laid down in an appeal decision, as it was with the issue of safety belts in cases. Well before the wearing of seat belts became compulsory in 1983, the Court of Appeal in 1975 laid down a yardstick of a 25 per cent reduction. It is this figure that is now increasingly being used in cycling cases.

⁷⁹ 420 F. Sup 300 (1976), affirmed 594 F. 2d 1230 (1979).

⁸⁰ [1939] 1 All ER 59, [1939] 1 KB 509, 108 LJKB 255, 160 LT 433,

⁸¹ See also the note by Lord Asquith in the *Law Quarterly Review* for July, 1953, vol. 69, at p. 317, which dealt with criticisms, which ‘were to the effect that even if the *volenti* doctrine did not apply, there was here a cast iron defence on the ground of contributory negligence. I have since had the pleadings and my notes exhumed, and they very clearly confirm my recollection that contributory negligence was not pleaded. Not merely so, but my notes show that I encouraged counsel for the defence to ask for leave to amend by adding this plea, but he would not be drawn: why, I have no idea.’

⁸² Now section 149 RTA 1988.

And when there is a fatality, the reduction still applies, to the detriment of the bereaved family.⁸³ However, this practice is highly questionable.

A close analysis of the *Froom v Butcher* shows that the Court of Appeal had in mind three separate scenarios, which were laid out by Lord Denning:

Where failure to wear a seat belt made absolutely no difference, there should be no reduction in damages at all.

Where injuries might have been less severe if a seat belt had been worn, then damages could be reduced by 15 per cent.

And only if ‘damage would have been prevented altogether’ should a reduction of 25 per cent be contemplated.

The ‘rolling’ historical position of seat belts litigation is instructive. First, with front seat belts, from 1967, all new cars and those manufactured since 1st January 1965, were required to be fitted with front seat belts. Then in the 1970s national advertising campaigns were conducted to encourage people to wear seat belts voluntarily - the ‘clunk click’ TV commercials in particular – which cost £ 2.5 million between 1972 and 1974. Consequently the wearing rate rose to about 33 per cent. Initial proposals for the compulsory wearing of seat belts were made in 1973. But it was not until 31st January 1983 that the use of seat belts in the front of cars became compulsory. Originally, this was for a trial period of three years, but compulsory wearing of front seat belts became permanent in 1986. With rear seat belts there was a similar history: starting 20 years later, when new cars had to be fitted with rear seat belts after April 1987, then there was then a more truncated development, with compulsory restraints for children under 14 from 1989, and an extension to adults in 1991. The use of seat belts by drivers and front seat passengers is now very high, with over 90 per cent of

⁸³ See for a classic instance the 80 per cent reduction of damages to a widow approved by the House of Lords, for disobeying an order although under the imperative of ‘piece rate’; *Stapley v Gypsum Mines*, [1953] AC 663, [1953] 2 All ER 478, [1953] 3 WLR 279, (100 LQR 629).

people in the front of cars wearing seat belts, but there is a much lower rate for the use of seat belts in the rear of cars, and a substantial proportion of children are still transported without restraint.⁸⁴ On the twentieth anniversary of compulsory seat belts legislation it was estimated by the Parliamentary Advisory Council for Transport Safety that this law had saved at least 7,400 and 140,000 serious injuries in the UK.⁸⁵ There was of course furious opposition to this requirement, and many, such as the plaintiff Harold Froom, had their non-scientific responses: he claimed his reason for not wearing a seat belt in 1972 was that ‘I do not personally like wearing seat belts. I have seen so many accidents on the road where, if seat belts are worn, then the said driver would never have got out of the vehicle that had been in the smash’. That argument was given short shrift by Lord Denning: The plaintiff had been injured as a result of a head-on collision with another car, which was the sole fault of that driver, Mr Butcher, overtaking; he pleaded guilty to a driving offence. Mr Froom suffered injuries to the head and chest which would have been avoided if he had been wearing his seat belt; he also suffered a broken finger which would not have been avoided. Until *Froom v Butcher* there had been over a dozen cases in the lower courts, with variable results on the issue of contributory negligence. In some instances it was clear that seat belts played no part as a feature in the level of damages, for example in *Challoner v Williams Shaw J* found on the evidence that the plaintiff was in fact wearing a seat belt, and also that even if he had not been wearing it, his injuries of a broken neck would have been just the same. *Obiter* he nevertheless indicated that a failure to wear a seat belt was not contributory negligence.⁸⁶ In other cases reviewed

⁸⁴ There seem to be many cultural factors: according to research, men are the worst offenders at failing to strap in, as 15 per cent of them fail to use a seat belt; drivers in the 17 to 29 age group are the least likely to strap themselves in. Kevin Delaney, road safety manager at the RAC Foundation, hypothesises that it is a matter of image: ‘because it is not seen to be cool’; *Evening Standard* (30 August 2002).

⁸⁵ *Evening Standard* (7 February 2003).

⁸⁶ [1974] RTR 221. A similar finding in *Smith v Blackburn* [1974] RTR 533, where O’Connor J found that the injuries would have been just the same, even if they had been wearing seat belts, but said that, even if a seat belt would have prevented some injury, he would ‘unhesitatingly have held that failure to wear seat belts did not amount to contributory negligence’. Other instances where a seat belt would not causally have made a difference,

by *Froom v Butcher* there had been a determination that a seat belt would have reduced or prevented damage, and the level of deduction ranged from several cases where there was no reduction, despite evidence that the absence of a seat belt had contributed to additional injury⁸⁷ to a reduction of one third.⁸⁸ The Court of Appeal reviewed the judgements and the scientific literature, and Lord Denning pointed out that ‘In these seat belt cases, the injured plaintiff is in no way to blame for the accident itself.’⁸⁹ However, in considering a reduction for contributory negligence ‘The question is not what was the cause of the accident. It is rather what was the cause of the damage’.⁹⁰ In a typical sub-heading, Lord Denning then went on to consider ‘The sensible practice’ in the context of it being ‘compulsory for every motor car to be fitted with seat belts for the front seats’ so that ‘Parliament must have thought it sensible to wear them. But it did not make it compulsory for anyone to wear a seat belt. Everyone is free to wear it or not, as he pleases. Free in this sense, that if he does not wear it, he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. But it is not a sensible thing to do.’⁹¹ The

but where the judge postulated a reduction for contributory negligence if it had, were *Freeborn v Thomas* [1975] RTR 16 (Sir George Baker P, ‘not be more than ten per cent’) and *Froom v Butcher* [1974] 3 All ER 517, [1974] 1 WLR 1297 (Nield J, 20 per cent).

⁸⁷ Nield J at first instance in *Froom v Butcher*; see also *Geier v Kujawa* [1970] 1 Lloyd’s Rep 264 (German female passenger who had never before seen seat belts); *Lertora v Finzi* [1973] RTR 161 (Judge Edgar Fay held that failure to wear a seat belt could be contributory negligence, but it had not been established in that case, and, in any event, that it would not have saved the injuries); *Chapman v Ward* [1975] RTR 7 (Stocker J found that some of her injuries would have been reduced if she had worn a seat belt, but not guilty of contributory negligence, and no reduction); *James v Parsons* [1975] RTR 20 (Kilner Brown J found the passenger’s facial injuries would have been prevented when he was flung from a sports car but ‘neither of these young men gave seat belts a single thought’, so no contributory negligence). In *Timms v Biernacki* (20th March 1975, unreported, Phillips J thought that failure to wear a seat belt was not contributory negligence).

⁸⁸ *Toperoff v Mor* [1973] RTR 419 (flung out of car, 25 per cent); *Pasternack v Poulton* [1973] 2 All ER 74, [1973] 1 WLR 476 (Kenneth Jones J held that if the plaintiff had worn a seat belt she would have been saved from her serious injuries, so reduced damages by 5 per cent); *Parnell v Shields* [1973] RTR 414 (driver of a van thrown out and killed, would have been saved if he had worn a seat belt, Wien J reduced the damages to the widow by 20 per cent); *McGee v Francis Shaw & Co Ltd* [1973] RTR 409 (passenger of ample girth and found seat belt ‘uncomfortable’, would have been saved if he had worn the seat belt, Kilner Brown J reduced his damages by fully one-third; *Drage v Sith* [1975] RTR 1 (Judge Stabb held plaintiff might not have been injured at all if she had worn a seat belt, deduction of 15 per cent).

⁸⁹ At 525.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* Judges do not always seem to have followed Lord Denning’s tariff approach slavishly, nor the settlement process either; see for example *Hibbert v Money* (QBD transcript 1980 H No 4412, 18 January 1984) where

scientific estimate at the time, indicated by the Minister of Transport, was that ‘the risk of death or injury is reduced by 50 per cent if a seat belt is worn’.⁹² The Highway Code too contained the advice: ‘Fit seat belts in your car and make sure they are always used, which had been there since 1968, and should have been known to Mr Froom in 1972. The legal position of the Highway Code is that, although a failure to observe ‘does not render a person liable to criminal proceedings of any kind’, the Highway Code ‘can be relied on in civil proceedings as tending to establish or negative liability’.⁹³ Lord Denning then indicated the legal requirement of exercising ‘all such precautions as a man of ordinary prudence would observe’⁹⁴ and indicated his tariff reductions of 25 per cent; 15 per cent; and zero deduction where the ‘evidence will show that the failure made no difference’.⁹⁵

In respect of riding a motorcycle without wearing a helmet, the leading case is *O’Connell v Jackson*⁹⁶ in 1971, which is about an injured claimant on a moped, technically a motorised pedal-cycle and therefore in law not very different from a bicycle. This decision was in the era before compulsory helmet wear.⁹⁷ The Court of Appeal came to a view that a motor cyclist who fails to wear a crash helmet in circumstances where a prudent road-user would do so and who is injured in an accident, may be held in part responsible for the injuries which he would not have

Mann J notes the agreed discount for a failure to wear a seat belt of 5 per cent, but indicated that ‘Having regard to the severity of the injuries caused by catching her face on the windscreen, which could in my judgment have been prevented by the wearing of a belt, I would have assessed the contributory percentage against Miss Patten at 20 per cent.’

⁹² *Hansard*, House of Commons (15 November 1974), quoted by Lord Denning at 526.

⁹³ Note section 37(5) of the Road Traffic 1972.

⁹⁴ *Vaughan v Menlove* (1837) 3 Bing NC 468, [1935-42] All ER Rep 156, *Glasgow Corporation v Muir* [1943] 2 All ER 44 at 48, [1943] AC 448 at 457 per Lord Macmillan.

⁹⁵ At 528.

⁹⁶ [1972] 1 QB 270, [1971] 3 All ER 129, [1971] 3 WLR 463, 2 Lloyd’s Rep 354, [1972] RTR 51.

⁹⁷ See section 16 Road Traffic Act 1988. s. 16(2) indicates that this shall not apply to any follower of the Sikh religion while he is wearing a turban. See also The Motor Cycle (Protective Helmets) Regulations 1998 (S.I. 1998 No. 1807), and generally *Wilkinson’s Road Traffic Offences* (London: Sweet & Maxwell, 20th edition 2001 and annual updates). In the USA nearly all 50 states passed laws requiring motorcycle helmets in the mid-1960s, and then in 1976 almost half of the states repealed their laws, resulting in increases from 25 per cent to 40 per cent in motorcycle fatalities; see Insurance Institute for Highway Safety, *Status Report*, Vol. 37, No. 1, January 12, 2002 for a full discussion of the variables.

received if he had been wearing a helmet, even though he was in no way to blame for the occurrence of the accident. At first instance Payne J held that the defendant motorist was solely to blame for the collision and that the plaintiff was not guilty of any contributory negligence. However, Edmund Davies LJ delivering the judgment of the Court of Appeal said that the failure of the plaintiff to wear a crash helmet should, in all the circumstances, have been held to constitute contributory negligence and ought accordingly to have led to a reduction in compensation. The evidence, which was not challenged, was that, while wearing a crash helmet would not have prevented or diminished the risk of the collision occurring, it 'would probably have reduced the gravity of his head injuries'. A key point was that in paragraph 24 of the latest edition of the *Highway Code* at that time was the suggestion that 'When on a motor cycle, scooter or moped, always wear a safety helmet,' although it was 'seriously open to doubt whether a copy was available to the plaintiff before he sustained his accident in the following month'. He said he was unaware of the existence of this advice in the Code. The earlier edition restricted itself to the advice (printed on the cover and not as part of the Code) that, 'Motor Cyclists should always wear properly fitted protective helmets', and made no reference to moped riders. The Court noted that in *Hilder v Associated Portland Cement Manufacturers* where a motor cyclist was killed as a result of being hit by a ball kicked by a boy playing in a field adjoining the highway, Ashworth J declined to hold that the failure of the motor cyclist to wear a crash helmet constituted contributory negligence on his part, pointing out that no advice on the matter appeared in the Highway Code and the absence of statutory regulations making compulsory the wearing of helmets.⁹⁸ Another critical matter in *O'Connell*

⁹⁸ *Hilder v Associated Portland Cement Manufacturers Ltd.* [1961] 3 All ER 709, [1961] 1 WLR 1434, 179 EG 445. Note the judge's finding of fact at 1436: '... having regard to [the plaintiff's] slow speed and relatively low height off the ground, I am by no means certain that, if he had been wearing a helmet, his skull would not have been fractured. Accordingly, if the claim succeeds, it succeeds in full.' The finding in *O'Connell v Jackson* was of course to the opposite effect.

was the transcript, as the claimant admitted he had been considering obtaining a crash helmet.⁹⁹ The defendants relied very heavily on the evidence of the claimant to suggest that he was an ‘experienced road-user of mature years [who] realised that the prudent user of a moped would wear a crash helmet for his own safety’s sake’, although they did not attempt to say that there should be a general proposition that failure to wear a helmet must in all circumstances lead to contributory negligence. The Court therefore held that he was ‘alive to this risk’ and had only himself to blame for failing to remedy the omission, so that his damages would be reduced 15 per cent.

It is therefore very important when applying these important precedents to the issue of cycle helmets, to note that these civil cases relied very considerably on the current *Highway Code*, introduced in 1999. That must be the inevitable civil yardstick for what the ‘prudent cyclist’ would consider as appropriate road behaviour. One key change in the latest edition has been to add provisions about ‘vulnerable road users’, indicating to drivers that ‘The most vulnerable road users are pedestrians, cyclists, motorcyclists and horse riders’.¹⁰⁰ But in the section entitled ‘Rules for Cyclists’ there is now a blunt statement under ‘Clothing’: You should wear a cycle helmet which conforms to current regulations’.¹⁰¹ In addition the *Highway Code* indicates that cyclists ‘should wear ... light-coloured or fluorescent clothing which helps other road users to see you in daylight and poor light [and] reflective clothing and/or accessories (belt, arm or ankle bands) in the dark’.¹⁰² An associated pictogram reinforces the message on helmets and fluorescent clothing. ‘Should’ is not a mandatory word, and can be contrasted with the ‘must’ in respect of ‘must have

⁹⁹ ‘Q Did you not think about getting a crash helmet? A I did do, yes.

‘Q Why did you not get one? A I don’t know really, I aimed to get one.

‘Q You knew that you ought to wear a helmet? A Yes.

‘Q You knew that the Highway Code says you should wear one, did you not? A I didn’t know that.

¹⁰⁰ Rules 180-200, current *Highway Code* approved by Parliament in June 1998, issued in February 1999.

¹⁰¹ Rule 45.

¹⁰² *Ibid.* See the comment in *Sunday Times* (21 February 1999): ‘It will warn motorists that they must stay clear of bicycles. Conversely, cyclists will be warned to wear bright clothing and protective helmets and install good lighting.’

front and rear lights lit ... must also be fitted with a red rear reflector',¹⁰³ which denote the provisions of the Road Traffic Act and regulations. Nevertheless these rules in the *Highway Code* are very salient points about what may be judged about 'the reasonably prudent cyclist' coming before the civil courts.

Another related issue was raised in *Capps v Miller*,¹⁰⁴ which is the self-evident point that when a helmet is worn, but the chin strap is left unfastened, the trial judge held that injuries had been increased by 'some incalculable degree'.¹⁰⁵ The defendant in that case was a drunk driver, who ran into the moped which was stationary just prior to the plaintiff turning right into the driveway of his home. Various theories were put forward as to the fastenings of the helmet, which had ended up in the lap of the car passenger, but the trial judge determined that it had been unfastened at the outset and adopted the view of a neurosurgeon that the plaintiff's 'brain injuries were a good deal more serious than they might have been had his helmet stayed on until his head made contact with the road inside it'. However, in considering the 'factors of causative potency and blameworthiness' Henry J considered that the collision 'catastrophic in its consequences ... was 100 per cent the defendant's fault' and refused to reduce the award of damages. The Court of Appeal reviewed the 1945 Act and came to a view that 'the judge fell into error' in eliding blame for the incident itself and blame for the severity of injuries. They felt that 'apportionment' in damages was appropriate. Croom-Johnson LJ indicated that although *Froom v Butcher* was a seat belt case as opposed to the pre-compulsion crash helmet case of *O'Connell v Jackson* 'now that both have been put on a statutory basis I see no reason to

¹⁰³ Rule 46. Bicycles must also be fitted with amber pedal reflectors, when manufactured after 1985. These are all of course mandatory legal requirements under the Road Vehicles Lighting Regulations (S.I. No. 1796) 1989.

¹⁰⁴ [1989] 2 All ER 333, [1989] 1 WLR 839, [1989] RTR 312. Rule 67 for motorcyclists also points the contrast when it states that 'On all journeys, the rider and pillion passenger on a motorcycle, scooter or moped MUST wear a protective helmet.

¹⁰⁵ regulation 4 of the Motor Cycles (Protective Helmets) Regulations 1980. reg 4(3) defines protective headgear' as headgear which is securely fastened to the head of the wearer by means of the straps provided for that purpose. Rule 67 of the *Highway Code* also states for motorcyclists that 'Helmets MUST comply with the Regulations and they MUST be fastened securely'.

distinguish between seat belt cases and crash helmet cases and I would apply the dictum of Lord Denning MR to crash helmets just as he spoke of it in relation to seat belts. Just as the unfastened seat belt is not a way of wearing a seat belt, so an unfastened helmet will not be a way of wearing the statutory helmet'.¹⁰⁶ The correct approach therefore would be that in future 'If the presence of the helmet would have made no difference at all, then the damages should not be reduced. If it would have prevented his injuries altogether, they should be reduced by 25 per cent. If the presence of the helmet on his head would have caused a less severe degree of injury, then the damages ought to be reduced by 15 per cent'.¹⁰⁷ However, the other two judges, Glidewell and May LJ, had come to a view that there should be a reduction of 10 per cent in this case, in that 'the degree of blameworthiness of a plaintiff, who puts on a crash helmet but fails to fasten it properly or at all, is less than that of one who does not put on his helmet at all'.¹⁰⁸

It would therefore seem that the *Froom v Butcher* triple yardstick is the critical test for helmet cases, following the elucidation in *O'Connell v Jackson* before protective headgear was made mandatory for motorcyclists, and *Capps v Miller* after the compulsion. Of course not all the factors are the same: motorcyclists travel at far greater speeds, the cycle helmet is a relatively flimsy cover compared to the all-round motorcycle helmet, and the fact that bicycles, mopeds and motorcycles have the same number of wheels is not necessarily a reason for the same rules to apply. However, there are many very familiar matters in the cases. For example, in *Owens v Brimmell*, a first instance decision in Cardiff in 1977, Tasker Watkins J had to deal with a passenger, not wearing a seat belt, driven by someone he knew to have drunk nine pints of beer. The evidence was not entirely clear whether injuries would have been

¹⁰⁶ At 339.

¹⁰⁷ At 341.

¹⁰⁸ Per Glidewell LJ at 343. May LJ agreed with 10 per cent, on the basis that a judge would 'merely give the best consideration that I can to the facts and circumstances of the instant case'.

reduced by wearing a seat belt, so there was no reduction on that account, but having regard to the inebriation, there was ‘widespread and weighty authority abroad for the proposition that a passenger may be guilty of contributory negligence if he rides with the driver of a car whom he knows has consumed alcohol in such quantity as is likely to impair to a dangerous degree that driver’s capacity to drive properly and safely’.¹⁰⁹ The judge therefore reduced damages by 20 per cent and there was no appeal. In another drink motorcycling case, the Court of Appeal had to review a finding of 100 per cent contributory negligence, which Beldam LJ found to be ‘logically unsupportable’; however, the court upheld the decision of Judge Fallon that a pillion rider who had spent the evening drinking with a motorcyclist, knowing him to be unlicensed and uninsured, and who also encouraged him to go faster and behave ‘in a reckless, irresponsible and idiotic way’, weaving on a major road, was engaged on a joint illegal enterprise. Although as we have seen *volenti* is no longer available as a defence on the roads, this was judged to be such reprehensible behaviour as to be within the maxim *ex turpi causa non oritur actio* (no right of action arises from a base cause).¹¹⁰ Beldam LJ indicated that if he had had to assess contributory negligence, he would have adjudged this to be 50 per cent.¹¹¹ In an earlier case on contributory negligence, *Dawrant v Nutt*¹¹² Stable J had to deal with a motor-cycle combination, driven by the plaintiff’s husband with the plaintiff as passenger, which collided at night with the defendant’s motor car, injuring the plaintiff and killing her husband. Before the accident occurred the front lights of the motor-cycle, to the knowledge of the plaintiff and her husband, had failed. The judgment was that both the husband and the defendant were equally to blame, so damages were reduced by a half. Stable J

¹⁰⁹ [1976] 3 All ER 765, [1977] QB 859, [1977] 2 WLR 943, [1977] RTR 82, at 771.

¹¹⁰ ‘this is a maxim of uncertain ambit’; *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 16th edition 1989): an example given that the ‘mere fact that the plaintiff was committing a crime at the time of his injury does not deprive him of an action’ is ‘dropping a brick on the head of a cyclist riding without lights or on the wrong side of the road’; 1-138.

¹¹¹ At 357.

¹¹² [1960] 3 All ER 681, [1961] 1 WLR 253.

made the point that ‘I have come to the conclusion that, in relation to the highway, it does not matter whether one is in a motor car or a dog-cart, whether one is on a bicycle or whether one is a pedestrian. Whether one is a passenger or a driver, one owes the same duty to other users of the highway to take reasonable care of oneself.’¹¹³

Conclusion

The simplistic mantra that absence of a cycle helmet equals culpability in the civil courts is wholly unacceptable. And yet this unjust formula appears to be in the mindset, and computer system, of motor vehicle insurers when dealing with a claim from an injured cyclist. There needs to be a much more sophisticated appreciation both of the scientific evidence on cycle helmets and of the law on contributory negligence. *Froom v Butcher* was a critical decision on seat belts before they were mandatory, so that is a useful starting point. However, it has never been a proposition for the contention that 25 per cent of damages should be deducted, but indicates three possibilities of 25 per cent, 15 per cent, and zero deduction. Together with *O’Connell v Jackson* on motor cycle helmets before they were mandatory, and *Capps v Miller* after they became mandatory, it is possible to see the basic features of the law on contributory negligence was extended to helmets. Even here the parallels are not entirely precise, but if anything lower percentages may be in order for the distinctions in speed, licensing and insurance arrangements.

What is clear is that there are many cycle injuries which cannot possibly be ascribed to the use or non-use of a cycle helmet. These are likely to be the vast majority coming before the civil courts. There should therefore be no deduction for

¹¹³ [1960] 3 All ER 681 at 682, [1961] 1 WLR 253 at 255.

any contributory negligence, as no causal link is possible. Perhaps 10 per cent or so of cycle injuries are in the classic ‘swallow dive over the handlebars’ category where a helmet may possibly diminish or save injury to the crown of the head. But the scientific research shows that there are many other factors here, and a blow to the face or the side of the head will not be protected by current headgear. In those circumstances a court might possibly consider the 10 to 15 per cent banding, but it would be extremely difficult to think of any circumstance justifying Lord Denning’s upper band of 25 per cent where ‘damage would have been prevented altogether if a [cycle helmet] had been worn.’¹¹⁴

¹¹⁴ *Froom v Butcher* [1975] 3 All ER 520, at 528.