

# APIL TRANSPORT SPECIAL INTEREST GROUP

March 2012

## Cycle Helmets: A Duty to Wear?

Martin Porter QC, 2 Temple Gardens

### Legal Duty

1. The answer to a legal duty is ‘no’. However contributory negligence does not depend upon a breach of a duty, to oneself or anybody else.

2. In the United Kingdom, unlike some other jurisdictions (notably Spain, Australia, Nova Scotia and, by legislation passed in 2010, children in Jersey), the wearing of protective headgear by cyclists has never been required by law. The last attempt, which would have applied to children, was the failed Protective Headgear for Young Cyclists Bill 2004<sup>1</sup> sponsored by Eric Martlow MP. This Bill attracted widespread opposition and was defeated in April 2004 due to lack of attendance at the second reading. The (Blair) Government position was that such a law would create enforcement difficulties and could adversely affect cycling levels.

3. Despite some support by the British Medical Association<sup>2</sup>, Headway<sup>3</sup> and another charity called ‘The Bicycle Helmet Initiative Trust’, for mandatory helmet laws, there is no prospect of compulsory cycle helmets on the UK mainland. At the Parliamentary Debate in Westminster Hall on 23<sup>rd</sup> February 2012 (picking up on The Times ‘Cities Fit for Cycling’ campaign) there was no sentiment in favour of mandating cycle helmet use. On the contrary Hansard reports:

“**Sheila Gilmore** (Edinburgh East) (Lab): Although safety issues are absolutely paramount—there are loads of junction issues in my own city of Edinburgh—one of the things that makes cycling so popular in other countries is that, partly because of the sheer number of people who cycle, people do not have to go through all that stuff about needing to have all these things to put on—the helmet and everything else—which can be off-putting. If we can get

---

<sup>1</sup> <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/021/2004021.pdf>

<sup>2</sup> [http://www.bma.org.uk/health\\_promotion\\_ethics/transport/promotingsafecycling.jsp?page=7](http://www.bma.org.uk/health_promotion_ethics/transport/promotingsafecycling.jsp?page=7)

<sup>3</sup> <http://www.headway.org.uk/news/Jersey-votes-to-make-cycle-helmets-compulsory-for-children.aspx>

to the stage where people feel that they can just come out of their houses, get on their bikes and cycle somewhere safely, we will have far more cyclists.”<sup>4</sup>

## **Contributory Negligence**

### *The argument for*

4. The Law Reform (Contributory Negligence) Act 1945 provides as follows:

#### Section 1

Apportionment of liability in case of contributory negligence.

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

#### Section 4

Interpretation.

The following expressions have the meanings hereby respectively assigned to them, that is to say—

“damage” includes loss of life and personal injury;

“fault” means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

5. A failure to comply with the advice in the Highway Code has been held to be sufficient to found a finding of Contributory Negligence. ***Froom v Butcher*** [1976] 1 QB 286 was decided when seatbelts were recommended in the then Highway Code

---

<sup>4</sup> <http://www.publications.parliament.uk/pa/cm/cmtoday/cmwhall/01.htm>

but were not required by law; likewise the earlier case *O'Connell v Jackson* [1972] 1 QB 270 in relation to moped riders' helmets.

6. The current Highway Code recommends the use of helmets. Rule 59<sup>5</sup> is reproduced here:

“59 Clothing. You should wear

- a cycle helmet which conforms to current regulations, is the correct size and securely fastened
- appropriate clothes for cycling. Avoid clothes which may get tangled in the chain, or in a wheel or may obscure your lights
- light-coloured or fluorescent clothing which helps other road users to see you in daylight and poor light
- reflective clothing and/or accessories (belt, arm or ankle bands) in the dark



7. A helmet can protect against the severity of injury in some circumstances.

8. Therefore failure to wear a helmet is contributory negligence justifying a reduction in the damages where injury would have been avoided or reduced by a helmet.

---

<sup>5</sup> [http://www.direct.gov.uk/en/TravelAndTransport/Highwaycode/DG\\_069837](http://www.direct.gov.uk/en/TravelAndTransport/Highwaycode/DG_069837)

## **The Authorities**

9. Decisions directly on point have been surprisingly scarce. There has only been one case where a Court has found *both* that a cyclist has been at fault in not wearing a helmet *and* that this fault has made any difference, **Reynolds v Strutt & Parker LLP** [2011] EWHC 2263. This case was rather idiosyncratic as it involved a cyclist blaming his employer for not requiring him to wear a helmet whilst participating in a race and the employer counter-alleging that helmets were available and that the Claimant should have worn one. Both sides blamed the other for the absence of a helmet to mitigate the consequences of the Claimant's own reckless actions which caused the accident. The degree of contributory negligence relating to the helmet was not separately specified and the overall contributory negligence (including recklessly causing the accident) was two-thirds. It should be further noted that this accident occurred on a dedicated cycling circuit and did not therefore involve consideration of the Highway Code. Instead the Judge and the parties appear to have proceeded upon a false premise that the Health & Safety Executive recommend cycle helmets. The relevance of the case is likely to be restricted to the duties of the organisers of mass start road races.

10. It should be noted that were a case to arise in which a cyclist was found to have contributed, by not wearing a helmet, to injuries sustained in an accident caused by another, then the maximum deduction should be 15% in accordance with *Froom* ("a good deal less severe") since it is hard to imagine a case where injury would be avoided altogether (25%).

11. There are differing decisions (all first instance High Court) as to whether a cyclist is at 'fault' in not wearing a helmet.

12. **A (A Child) v Shorrock** [2001] CL October Digest 386; HHJ Brown sitting as a deputy Judge of the High Court in Newcastle  
14 year old cyclist's claim dismissed as the Defendant motorist was found to have had no chance to avoid the collision.

But, had liability been established, there would have been no reduction for failure to wear a helmet as there was no statutory requirement for the Claimant to do so and he was not engaged in any particularly hazardous kind of cycling.

13. ***Smith v Finch*** [2009] EWHC53 Griffith Williams J<sup>6</sup>

Cyclist who was run down by a motorcycle and sustained serious brain injury was held to be at fault in not wearing a helmet. However the Defendant motorcyclist had not proved that wearing a helmet would have made any difference to the Claimant's injuries and there was therefore no reduction.

14. ***Phethean-Hubble v Coles*** [2011] EWHC 363 (QB) HHJ Wilcox

Child cyclist rides from pavement onto road into the path of (child) motorist sustaining serious brain injury in the resulting collision. The Judge followed *Smith v Finch* finding both that the cyclist was at fault in not wearing a helmet and also that it had not been established that a helmet would have made any difference. The division of responsibility for causing the accident was one third cyclist and two thirds motorist (a decision that may well not survive appeal). The finding that a helmet would not have made a difference was not appealed. *Shorrocks* was not cited.

### **The Smith v Finch reasoning**

15. The kernel of Griffith Williams J's Judgment in respect of fault is expressed thus:

“44. In my judgment the observations of Lord Denning MR in *Froom and others v. Butcher* above should apply to the wearing of helmets by cyclists. It matters not that there is no legal compulsion for cyclists to wear helmets and so a cyclist is free to choose whether or not to wear one because there can be no doubt that the failure to wear a helmet may expose the cyclist to the risk of greater injury; such a failure would not be “a sensible thing to do” and so,

---

<sup>6</sup> For a criticism (mine!) of this decision see <http://www.newlawjournal.co.uk/nlj/content/personal-injury-blame-victim>

subject to issues of causation, any injury sustained may be the cyclist's own fault and "he has only himself to thank for the consequences".

### **The contrary arguments on fault**

#### **(a) The virtues of cycling**

16. The underlying premise to most of what follows is that cycling is a good thing. The public policy interest in encouraging and promoting cycling is widely recognised and the subject of much public expenditure. Cycling increases levels of fitness and longevity and decreases obesity, healthcare costs, traffic congestion, pollution and the burning of fossil fuels.

#### **(b) The Efficacy of Cycle Helmets**

17. In contrast to the position with seat-belts and motorcycle helmets, the evidence as to the efficacy of helmets is hugely controversial. Cycle helmets are not designed to protect the wearer from impact with a moving motor vehicle. There has to be a compromise between protection and usability. The 'current regulations' referred to in the Highway Code are BS EN 1078:1997 (British and European Standards are now the same). The requirements involve a freefall drop from 1.5 metres onto a flat and a kerb shaped anvil at an impact speed of 5.42 m/s (12.1 mph). Such a helmet will comply with the advice in the Highway Code so there can be no realistic argument that a more robust helmet should be worn. Griffith Williams J in *Smith v Finch* found that the impact speed exceeded 12.3 mph and so he could not be satisfied that a helmet would have made any difference. This is a common theme in that no Court (save for in the unusual case of *Reynolds*) has yet found that a helmet would have made a difference in any particular case. This is not surprising since the high value claims worth litigating are likely to involve serious injury following high impact. The type of accident most likely to give a Defendant an argument on causative contributory negligence might be the car door opening into the path of a slow moving cyclist who suffers a scalp laceration –hardly worth litigating. The lack of protection in the type of accident which results in the most serious injuries must also be relevant to the question whether the cyclist is at fault in not choosing to wear a helmet.

18. Published literature in this field needs to be treated with extreme caution. Much of the literature simply reviews other literature. There is a need to be alert to possible author bias. Further there is a clear problem in hospital based studies with finding a suitable control group; those who choose to wear helmets may differ in all sorts of ways from those who do not choose to wear helmets. Mandating the use of cycle helmets in Australia did not reduce the rate of head injuries sustained by cyclists.<sup>7</sup> This may be because helmets do not work and/or because mandating helmets reduced the number of cyclists and/or because of risk compensation. There is further said to be no correlation in this country between rates of helmet use and rates of head injury.<sup>8</sup> Yet the BMA states a belief that cycle helmets do reduce the risk of head injury.<sup>9</sup> The literature has been reviewed twice in the last decade at the behest of the government.

19. The first such report was commissioned by the Department for Transport in November 2002: **“Bicycle Helmets: Review of effectiveness (No 30)”**<sup>10</sup> (now archived). This report accepted that cycle helmets reduced the risk of head injury but formed no conclusions on the effects that promoting cycle helmet use would have on levels of cycling or on behaviour. Like the BMA this paper accepted the oft-criticised Thompson papers<sup>11</sup> as demonstrating lower head injury rates amongst helmet users.

20. The Department for Transport commissioned a further report in 2009 from the Transport Research Laboratory **“The Potential for Cycle Helmets to Prevent Injury: A Review of the Evidence”**.<sup>12</sup> This time the findings were rather less certain.

---

<sup>7</sup> Robinson DL. [Do enforced bicycle helmet laws improve public health?](#) BMJ, 2006;332:722

<sup>8</sup> Hewson PJ. [Cycle helmets and road casualties in the UK](#). Traffic Injury Prevention, 2005;6(2):127-134

<sup>9</sup> [http://www.bma.org.uk/health\\_promotion\\_ethics/transport/promotingsafecycling.jsp?page=3](http://www.bma.org.uk/health_promotion_ethics/transport/promotingsafecycling.jsp?page=3). The view is based on papers and a ‘Cochrane’ review by DC & RS Thompson; for a different view of this research see [www.cyclehelmets.org](http://www.cyclehelmets.org).

<sup>10</sup>

<http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/pgr/roadsafety/research/rsrr/theme1/bicyclehelmetsreviewofeffect4726>

<sup>11</sup> See <http://www.cyclehelmets.org/papers/d1068.pdf> for the original authors’ abstract and a criticism of their control groups. The authors examined 145 children admitted to hospital in Seattle with head injuries and concluded that helmet wearers were underrepresented in that group compared to control groups.

<sup>12</sup> This can be downloaded (free of charge) from

[http://www.trl.co.uk/online\\_store/reports\\_publications/trl\\_reports/cat\\_road\\_user\\_safety/report\\_the\\_potential\\_for\\_cycle\\_helmets\\_to\\_prevent\\_injury\\_\\_\\_a\\_review\\_of\\_the\\_evidence.htm](http://www.trl.co.uk/online_store/reports_publications/trl_reports/cat_road_user_safety/report_the_potential_for_cycle_helmets_to_prevent_injury___a_review_of_the_evidence.htm)

The report accepts that population studies do not show the benefits said to be apparent from hospital admission studies (which sought to compare injuries to helmeted and non-helmeted cyclists admitted to hospitals). It concluded that the effectiveness of helmets could not be established from a literature review alone. The report's authors then considered the descriptions of head injury in police reports relating to fatalities and in hospital admission descriptions of head injuries and formed a biomechanical assessment of the proportion of these injuries that *might* have been prevented by a helmet.

21. From this, the TRL report concluded that helmets 'would be expected to be effective' in a range of accident conditions particularly those that do not involve a collision with another vehicle or when another vehicle glances the cyclist tipping them over. They further concluded that helmets 'would be expected to be particularly effective' for children as their heads are less than 1.5 metres from the ground (the relevant standard). The report did not express a view on the effects of promoting helmets on cycling numbers or on risk compensation.

22. The efficacy of a cycle helmet in reducing the risks of injury is not as clear cut as that of a seatbelt or motorcycle helmet. The individual should be free to decide what he makes of this. There is no authority for a general proposition that a road user who does not comply with advice in the Highway Code is automatically at fault (for example, reflective clothing or accessories advised for cyclists *and* pedestrians).

23. The Government advice in the 1970s<sup>13</sup> in relation to seat-belt use was much stronger than that currently given to cyclists in relation to helmets.<sup>14</sup> The 1970s Highway Code stated "Fit seats belts in your car and make sure they are always used.". By July 1976 when *Froom v Butcher* reached the Court of Appeal, legislation was in prospect to make seat-belt use compulsory.<sup>15</sup> Lord Denning referred to the delayed legislation and the Court of Appeal in *Stanton v Collinson* [2010] EWCA

---

<sup>13</sup> Those of a certain (my) age will remember Jimmy Saville's 'Clunk. Click, Every Trip' TV campaigns.

<sup>14</sup> Likewise the advice to moped riders at the time of O'Connell "When on a motor cycle, scooter or moped, always wear a safety helmet." Legislation had been passed enabling the Minister to make helmets mandatory for moped users but he had not yet done so. Mr O'Connell admitted he knew he ought to have worn a helmet.

<sup>15</sup> Several Bills had been introduced into Parliament but failed on procedural grounds. A Government sponsored Bill failed with the fall of the Callaghan Government in 1979. Compulsion was eventually enacted in the Transport Act 1981.



Civ 81 referred to ‘the anticipation of modern public attitudes which underlay *Froom v Butcher*.’ There is a clear implication that the degree of fault in (criminally) not wearing a seat-belt is no greater now than it was in 1976. It would be quite wrong to anticipate any future public attitudes mandating cycle helmet use.

### **(c) The safety of cycling**

24. The degree of risk of head injury must be relevant to an assessment of fault under the 1945 Act. It cannot be sufficient that ‘failure to wear a helmet may expose the cyclist to the risk of greater injury’ as the same holds true with the substitution of the word ‘motorist’ or ‘pedestrian’ for ‘cyclist’. The perception of risk in cycling is often much greater than the reality.

25. Annexed are some DfT statistics, which relate to 2008 save that Table 1 relates to 2007<sup>16</sup>. The risk of being killed or seriously injured<sup>17</sup> riding a bicycle was 541 per bnkm. The likelihood of death or serious injury is approximately half that for a motorcycle undertaking the same journey. If you decide to cycle rather than walk the same distance you are slightly less likely to be killed though somewhat more likely to be injured. You are safer in a car and much safer in a bus/coach travelling the same distance. The observation about individual risks being one in 500,000 years appears too rosy though as 68 km/year seems inexplicable unless it includes non-cyclists. Nevertheless a cyclist who covers 10,000 km/year with average skill and luck could expect one serious injury every 175 years.

26. The risks are comparable to those faced by pedestrians yet nobody seriously suggests that pedestrians should wear helmets. What of the cyclist who crosses a shared cycle/pedestrian crossing alongside a pedestrian when both are run down by a motorist who jumps the lights?<sup>18</sup>

---

<sup>16</sup> More recent statistics released thus far do not make the risk per distance statistics so clearly.

<sup>17</sup> *Serious injury*: An injury for which a person is detained in hospital as an “in-patient”, or any of the following injuries whether or not they are detained in hospital: fractures, concussion, internal injuries, crushings, burns (excluding friction burns), severe cuts, severe general shock requiring medical treatment and injuries causing death 30 or more days after the *accident*.

<sup>18</sup> I have heard anecdotally of a case where there is a dispute over whether the cyclist was pushing or astride her bicycle as she crossed the road and therefore whether she should have been wearing a helmet.

27. There is also no real logic to a line drawn between the cyclist and the motorist. The motorist driving from London to Edinburgh faces a comparable risk of death or serious injury as the cyclist travelling from London to Watford. The real comparison is not with car seat-belts but with motor helmets.<sup>19</sup>

28. A legitimate concern is the cost to the NHS (and society generally) of treating avoidable head injuries. Because of the much higher numbers of pedestrians and motorists the widespread adoption of motoring and pedestrian helmets would avoid vastly more head injuries than cycle helmets. It is a distorted perception of risk that sets cycling apart.<sup>20</sup> The respect in which cycling should be set apart is the opposite one, that increased cycling rates will *reduce* the costs to the NHS of treating ill-health.

### **Promote helmet use *or* cycling**

29. Population studies have demonstrated conclusively that the promotion of helmet wearing reduces levels of cycling. The experience in Australia<sup>21</sup>, Canada<sup>22</sup> and Denmark<sup>23</sup> all indicate this. Contrast the position in Holland where cycling is widespread and virtually nobody wears a helmet. The reasons for this negative correlation are necessarily speculative but are probably a combination of helmet

---

<sup>19</sup> These exist not only for racing cars but were also produced for and marketed to the general motoring population by an Australian manufacturer, see <http://www.copenhagenez.com/2009/05/motoring-helmets-for-real-high-risk.html>

<sup>20</sup> For instance, competitors in the Tour de France have been required to wear helmets largely in reaction to the tragic death of Fabio Casartelli descending the Portet d'Aspet at 55 mph on 18<sup>th</sup> July 1995. Yet only three riders have died riding the Tour in it's 100 year history, Francesco Cepeda (1935) and Tom Simpson (1967) being the others. The same number of spectators has died in the last decade. Helmets for spectators?

<sup>21</sup> **Ride your bike: healthy policy for Australians**

Rissel C. *Health Promotion Journal of Australia*. 2003;14(3):151-153

Emphasis on helmets has deterred many people from achieving the health benefits of cycling.

<sup>22</sup> **Hats off (or not?) to helmet legislation**

Chipman ML. *Canadian Medical Association Journal*, 2002;166(5): 602

Although the proportion of cyclists wearing helmets increased in Nova Scotia following helmet legislation and the number of head injuries fell, the main effect of the law was a large decrease in the number of people cycling.

<sup>23</sup> **Sikre skoleveje: En undersøgelse af børns trafikikkerhed og transportvaner**

Jensen SU, Hummer CH. *Danmarks Transport Forskning, Rapport 3*. 2002.

Helmet promotion may be responsible for a generation opting for driving instead of cycling.

promotion increasing the perception of risk, adding inconvenience/discomfort and concern about appearance<sup>24</sup>.

30. Large sums of public money are now spent encouraging cycling (hundreds of millions according to the DfT<sup>25</sup>). The overwhelming public interest is in promoting cycling not helmets.

31. It has also been observed that a decrease in the numbers of cyclists leads to an increase in the accident rate for those cyclists who remain.<sup>26</sup> Possible explanations for these observations are that motorists become used to more cyclists and notice them and that a higher proportion of motorists cycle. Accordingly the promotion of cycle helmets can increase the level of danger for cyclists by reducing their number.

### **Risk Compensation**<sup>27</sup>

32. Since the 1970s it has become gradually recognised that a reduction of risk leads to compensating changes in behaviour. Straightening roads leads to higher speeds to the extent that chicanes are now often built into residential streets. Seatbelt use reduces injuries to car occupants who wear them. However, when first introduced, the legislation applied only to front seat passengers and there was an initial *increase* in fatalities amongst rear seat passengers.<sup>28</sup> There was furthermore an increase in the numbers of pedestrians and cyclists injured by belted drivers.<sup>29</sup> There is evidence that drivers are more careful around helmetless riders<sup>30</sup>, presumably because they regard them as more vulnerable or more human. It would be consistent with the theory of risk compensation for helmeted cyclists to take less care including when around pedestrians.

---

<sup>24</sup> <http://www.dft.gov.uk/cyclingengland/2008/09/helmet-hair-and-perspiration-prevent-women-getting-in-the-saddle/>

<sup>25</sup> <http://www.dft.gov.uk/pgr/sustainable/cycling/cyclingfuture.pdf>

<sup>26</sup> Hence the CTC's 'Safety in Numbers' campaign

[http://www.ctc.org.uk/resources/Campaigns/0905\\_SiN\\_full\\_rpt.pdf](http://www.ctc.org.uk/resources/Campaigns/0905_SiN_full_rpt.pdf)

<sup>27</sup> Prof John Adams of UCL has written whole books on this subject: 'Risk' (1995) UCL Press. His 1985 book 'Risk and Freedom' can be downloaded here <http://john-adams.co.uk/books/>

<sup>28</sup> Durbin J, Harvey A: *The effects of seat belt legislation on road casualties in Great Britain*, DtP, October 1985

<sup>29</sup> Methodological Issues in Testing the Hypothesis of Risk Compensation by Brian Dulisse, Accident Analysis and Prevention Vol. 25 (5): 285-292, 1997

<sup>30</sup> Prof Ian Walker Accident Analysis and Prevention 39(2007) 417 - 425

33. Risk compensation provides a plausible explanation for why the population studies have failed to show any increase in the overall safety of cyclists where helmet wearing rates are increased.

34. Where the safety benefits are marginal, as in the case of cycle helmets, they are capable of being offset by risk compensation.

### **Convenience/Comfort**

35. If it is accepted that cycling is to be encouraged, then it is sensible to make it as convenient and comfortable as possible.<sup>31</sup> In Spain a mandatory helmet law does not apply when it is hot or in town or to a cyclist who is training (and is not enforced against anyone anyway). The Velib scheme (short term hire from one cycle stand to another within a city) is a success in Paris, Dublin and many other European cities. Its London equivalent, the 'Boris Bike', is hailed as a huge success. It works in Barcelona because of the exemption within towns. Tel Aviv and Mexico City both have schemes which have been helped by the repeal (at least in part) of compulsory helmet legislation. Melbourne and Brisbane have schemes that have reportedly struggled due to the mandatory helmet legislation. Velibs offer convenience and spontaneity, it is obviously counter-productive to condemn as being at fault the user who does not have a helmet on him.

### **Distraction**

36. The promotion of helmets (whether by pronouncements that helmetless cyclists are at fault or otherwise) distracts from the far more important objective of reducing accidents. Levels of cycling are not likely to meet the hopes of government and local authorities until people in large numbers feel safe on bicycles. This requires confidence that they will not be run down by a motor vehicle. Nothing should distract from the imperative of bringing home to the motorist the full responsibility for the consequences of negligent driving around vulnerable road users.

---

<sup>31</sup> Consider that obese people may obtain a medical certificate exempting them from wearing seatbelts and further will not suffer a reduction for contributory negligence; nor will taxi-drivers.

## **Evidence**

37. The burden of proving causative contributory negligence rests on the Defendant. *Stanton v Collinson* and *Smith v Finch* both emphasise the importance of medical evidence that without the fault the injuries would have been a good deal less severe. In the case of helmets the type of injury is important; most neurosurgeons will accept that a helmet may avoid lacerations or a skull fracture or an extradural/subdural haematoma but few will argue that they can protect against coup or contrecoup type injuries or diffuse axonal injury. Some neurologists take the view that a helmet may increase the risk of a rotational type injury to the brain because the diameter of the head is effectively increased. Most medical experts will wish to defer to the expertise of a cycling expert on the efficacy of helmets and consequences of their promotion.

## **Conclusion**

38. It is suggested that it is neither right nor wrong for a cyclist to wear or not wear a helmet. It should be a matter of personal choice leaving the blame to lie with the person or persons responsible for the collision.