



## PI DEFENDANT SEMINAR 2013

### CONTRIBUTORY NEGLIGENCE WORKSHOP PROBLEM 2

#### Scenario and Discussion

##### Scenario:

Gustave (aged 19) and Marcel (aged 16) were cycling along a road subject to a 30mph speed restriction. Neither was wearing a helmet.

Gustave was cycling fast. As he steered carefully around a hazard on the road, Emma, who was driving too close to him, struck him and knocked him off his bike. He hit his head on the kerb and suffered a head injury, bilateral leg fractures, and a shoulder injury. The witnesses agree that he was riding at c20mph, and Emma was driving at c30mph.

Marcel was cycling slowly, 'bunny-hopping' between the road and the pavement. As he 'bunny-hopped' at an angle from the pavement onto the road, Albertine, who was driving past in the same direction, struck him and knocked him off his bike. He was thrown first against the bonnet and then the windscreen and then hit the ground hard with the right hand side of his head. He suffered a head and brain injury. There was no opportunity for Albertine to avoid a collision. She admits that she was driving at c35mph. Marcel had not seen her at all.

Gustave and Marcel have both invited the Defendant to admit liability in full.

##### Discussion – Gustave:

There is no legal compulsion for cyclists to wear helmets, but the failure to do so might expose them to a greater risk of injury; such a failure, like that of a car-user to wear a seat-belt would not be sensible and so, subject to causation, any injury sustained might be deemed in part the cyclist's fault (*Smith v Finch* [2009] EWHC 53 (QB), *Froom v Butcher* [1976] QB 286 applied). If Gustave hit the ground at a speed greater than 12mph then the wearing of a helmet would have made no difference. (*Smith v Finch*) Was he cycling too fast, though? (In *Howells v Trefigin Oil and Trefigin Quarries Ltd*, December 2, 1997, unreported save Lawtel, a cyclist riding at 25mph in bad weather and with his head down was deemed to be wholly responsible for his injuries when he struck a parked lorry protruding into a bend in the road: he should have kept a better look out or moderated his speed.) If so, then what would the impact speed have been if he had been cycling at a reasonable speed? If the impact speed was / would have been lower than 12mph then it would fall to Emma to prove that his injuries would have been avoided or reduced by a helmet. She might be able to do so in respect of the head injury and possibly the shoulder injury but not the bilateral leg fractures. Standard deductions are 25% where injuries would have been avoided and 15% where they would have been reduced.



## Discussion – Marcel:

Should Albertine be deemed primarily liable by virtue of her excessive speed? (In *Phethean-Hubble v Coles* [2011] EWHC 363 (QB) the court held that the driver was going too fast and should have known that there was a risk that the cyclist might have left the footpath for the road. Query whether this was a perverse decision. There was no evidence that a reduced speed would have avoided or reduced the injuries. Why should she have known that the cyclist might leave the road?) In this scenario, query whether Albertine might be deemed primarily liable because she should have seen Marcel ‘bunny-hopping’ between the road and the pavement and reduced her speed still further or taken a wide berth or sounded her horn on approach. What arguments might be made in respect of contributory negligence? Marcel created the emergency situation by ‘bunny-hopping’ at an angle from the pavement onto the road, and he wasn’t wearing a helmet. What percentage deduction should be made for the former? In *Phethean-Hubble v Coles*, the court applied a one third deduction (reduced from 50% on the basis that the cyclist was only 16 and so lacked the maturity and judgment of an adult; again, arguably perverse). What, if any, deduction should be made for the latter? In *Phethean-Hubble v Coles*, the court applied no reduction at all on the basis that there had been more than one impact and so wearing a helmet would have had a minimal effect. As above, the burden falls on Albertine to prove that Marcel’s injuries would have been reduced or prevented by a helmet. Standard deductions are 25% where injuries would have been avoided and 15% where they would have been reduced.