

# Wheels set in motion

The courts are showing signs of a move towards contributory negligence rulings where cycling helmets are not worn by claimant cyclists, but a question remains over how effective helmets actually are in preventing injury, says **Emily Formby**

**ONCE AGAIN THE** cycling world is in a spin. "Outrage at ruling on helmets for cyclists" screams *The Independent* (16 March 2009), the article flanked by a photograph of a bare-headed David Cameron cycling through the streets. "My cycling helmet saved my life" counters Alec Lom in *The Telegraph* (22 March 2009), photographed clutching his helmet and wearing a high-visibility jacket for good measure. "Helmets are being made compulsory by the back door" complains the CTC, the UK's national cyclists' organisation who are apparently considering legal action to overturn the High Court ruling which has given rise to all this fuss.

That Mr Justice Griffith Williams' comments in *Smith v Finch* [2009] EWCH 53 (QB) have caused such a furore may perhaps be no more than a timely reminder that, on occasion, the common law does reflect and indeed direct a tide of social change.

But what is the issue? Are cycle helmets good or bad? Do they prevent or reduce accidents? Or are they simply a sop, the giver of false confidence to rider and vehicle driver? Indeed, are they even harmful?

## Causation and consequences

An analysis of just what the recent legal fuss has been about is a useful starting point. In January 2009, Mr Justice Griffith Williams handed down judgment in the case of *Smith v Finch*. Robert Smith, a 29-year-old cyclist, suffered serious head injuries in 2005 when he was knocked from his bike by Michael Finch, a motorcyclist who tried to overtake him at speed. While the circumstances in which the accident happened were disputed, Mr Justice Griffith Williams had little difficulty finding that the accident was caused by Mr Finch trying to overtake the cyclist, who was preparing to turn right into a driveway.

The consequences of the accident were significant: a serious head injury caused when Mr Smith fell from his bike; the point of impact being the occipital bone (a saucer-shaped membrane bone situated at



the back and lower part of the cranium); the speed something over 12mph.

## Contributory negligence?

Having found for the claimant, Mr Justice Griffith Williams had to rule on an allegation of contributory negligence made by the defendant. It was, said Mr Finch, as a matter of fact true that the claimant's injuries were in part his own fault. His fault lay in failing to wear a cycling helmet. While not mandatory, nor a legal requirement, it is nonetheless right, said the defendant, to note that *The Highway Code* specifies that a cyclist *should* wear a cycling helmet (rule 45).

This line of argument appears to have found favour with the court because the judge went on to say [at para. 4]: "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, 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."

## Duty to wear a helmet

For the first time, therefore, a judge has held that a cyclist has a duty to wear a helmet when cycling. Failure to do so is negligent. Therefore, to the extent his injury was caused by the failure to wear a helmet, the claimant is the author of his own misfortune. He has nobody to blame but himself.

One can only wonder at the evidence that was before the judge because even the scantest home research throws doubt on the conclusion that failure to wear a helmet may expose the cyclist to the risk of great injury. For example:

- (i) the British Government has said that it knows of no data linking increases in helmet use with improvements in cycling safety (letter from David Jamieson MP Minister of Department of Transport, to Michael Jack MP, October 2003);
- (ii) In Greater London cyclist injuries became more serious as helmet use increased in the mid 1990s. In 2001, although some 50 per cent of cyclists wore helmets, the severity of injuries was higher than in 1981 and fatalities were at their highest since 1989. The severity of pedestrian injuries (which had previously tracked those of cyclists) continued to

decline (traffic casualty statistic from Transport for London; helmet wearing data from TfL.)

The defendant in *Smith* supported his submissions by referring to *Froom v Butcher* [1976] 1QB 286. In *Froom*, Lord Denning concluded that since Parliament required seat belts to be fitted in the front seats of cars, it must have thought they had a purpose. Indeed, said the court, their presence showed that everyone in the front seat of a car should wear one. This concluded view of the court was some seven years ahead of Parliament's action to make the wearing of seat belts compulsory. So too, said Mr Finch's representatives, should the present day court act in relation to cycle helmets. The helmets are there. Their use is mandated in *The Highway Code*. The Code would not suggest that cyclists should wear a helmet unless it could be said that by wearing a helmet they would be less vulnerable to injury. Failure to wear a helmet, therefore, increased the risk of injury.

### Helmets not a panacea

In fact, Mr Smith's failure to wear a helmet on this occasion was found to have had no adverse consequence. When Mr Smith fell he had fallen onto his occipital bone. The speed at which he was travelling was somewhat more than 12mph. Helmets are only tested (European EN 1078) to a standard whereby the helmet will provide protection from fatal head injury when the cyclist falls onto a flat surface at no greater a speed than 15mph.

In this accident, the claimant hit the ground at a greater speed than 15pmh, and did not strike his head on a flat surface. Therefore, the helmet would have provided no protection and the causative link was not established.

In some ways, therefore, the defendant's arguments were to no practical avail – the claimant recovered 100 per cent of damages. It could be said that Mr Justice Griffith Williams' comments on helmet wearing and contributory negligence are therefore obiter and so would have no

binding force in subsequent accidents.

Whatever the standing of his comments, however, they serve to show just how far the court has moved in recent years on the efficacy of wearing a helmet. In *Williams v*

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*Ashley* EC/09/99 (unreported), the defendant sought a 20 per cent reduction on the claimant's damages for contributory negligence arising from a failure to wear either a helmet or shiny reflective clothing.

The argument was more than a matter of submissions. The defendant was supported by an expert from ROSPA (the Royal Society for the Prevention of Accidents). This expert concluded that it was negligent not to wear a helmet when cycling. The claimant relied on Dr Nigel Mills, the chairman of the British Standards Institution committee for motorcycle helmets in January 1994.

Shortly before trial, the defendant conceded the point and the claimant collected 100 per cent damages. On learning that the defendant had abandoned the helmet issue the judge (HHJ Rogers QC) confirmed that to his mind it was not surprising that the allegations should have been abandoned.

It is not clear, however, if HHJ Rogers QC's comment just related to the simple causation issue (once again this was a case where the injury was due to the right side of his face hitting the road so not the type of accident for which the efficacy of helmets is tested) or if he was referring to the wider principle of a potential legal duty

owed by cyclists – breached if no helmet were worn.

### Do helmets make things worse?

Contrary to Mr Justice Griffith Williams' belief, there are many doctors who conclude that cycle helmets can in fact increase the risk of the most serious type of brain injury by converting direct forces into rotational ones that helmets do not mitigate (Curnow WJ, 'The efficacy of bicycle helmets against brain injury. Accident analysis and Prevention', 2003, 25:287-292). Therefore, it may not simply be a case of the helmet being useless, the fall being to the shoulder or the speed being over 15 mph. The helmet could in fact be making things worse.

As Boris Johnson said, the situation is a mess: "I have been convinced beyond all reasonable doubt of complete incoherence on the question of cycle helmets" (*The Telegraph*).

Despite the judicial comments in *Smith*, there is still no case where a judge has actually reduced the claimant cyclist's damages to reflect his contributory negligence. While the possibility came a step closer to reality in March, given the large amount of conflicting evidence on the efficacy of helmet wearing we are still some way from such a ruling.

### Pointless and arbitrary?

It should also be remembered that the overall risk of harm when cycling is very low. Between 1998 and 2000 there were about 123 deaths and 2,000 serious injuries sustained by adult cyclists. Many activities remain more risky – a pedestrian is more likely to come to serious harm than a cyclist. Some say that car passengers wearing helmets would do more to reduce serious injury than requiring cyclists to don headgear. The lobby groups are out there. The statistics are being gathered. They are being interpreted to show that cycle helmets should be worn and also to prove the contrary view that wearing a cycle helmet is a pointless and arbitrary curtailment of the rider's right to choose.

As a cyclist, for the moment, the decision remains yours. As a litigator, it is becoming increasingly likely that the courts will start more readily to entertain the likelihood of a non-helmet-wearing reduction in liability for the cyclist, should the necessary causation argument be met. An increased reliance on expert evidence seems inevitable.

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### What can the injury practitioner do?

- (i) Evidence remains crucial. Whether for claimant or defendant there must be clear evidence that the helmet would have made a difference. As Mr Justice Griffiths Williams states: "if a party seeks to persuade a court that an injury would not have occurred or would not have been so serious, only a medical practitioner can speak to that";
- (ii) The burden remains with the defendant – the failure to wear a helmet must be proved to be a contributory cause of the damage (*Lewis v Denye* [1939] 1kb 540);
- (iii) Analysis of the facts of the particular claim will be required to pick out the element of the claim for which the claimant is to blame.