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Cycle Helmets and Contributory Negligence:

A hard-headed approach to freedom of choice?

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THE LAW: BASICS

- Contributory negligence must be pleaded – it is not open to the trial judge to apportion blame of his or her own motion (*Fookes v Slaytor* [1979] 1 All E.R. 137)

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Standard of Care in Counterclaims

- The standard of care to be expected of the Claimant in situations where contributory negligence is alleged is identical to that of the Defendant when examining breach. The test is the same.

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- *Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself; and in his reckonings he must take into account the possibility of others being careless' - per Denning LJ in Jones v Livox Quarries Ltd [1952] 2 Q.B. 608:*

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Relevant Statute

- This field is partially governed by statute. Section 1 of the Law Reform (Contributory Negligence) Act 1945 states that:

'*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*'

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- The word 'fault' in the Act bears the same meaning as 'negligence' in the context with which we concerned.

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Burden of Proof

- The burden of proving contributory negligence lies on the Defendant.

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Is there any Legal Obligation to wear a Cycle Helmet?

- There is no obligation on cyclists to wear a cycle helmet per se.
- However, the Highway Code states at Rule 59 that:

'*You **should** wear*

a cycle helmet which conforms to current regulations, is the correct size and securely fastened'

- There have been a number of legislative attempts to make cycle helmets mandatory, particularly for children. Nothing has passed into law, however.

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Is it negligent not to wear a cycle helmet?

- This is a surprisingly vexed question given the frequency with which such cases concerning cyclists have been before superior courts in recent years.

- No hard and fast principles have emerged from recent jurisprudence.

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'Free in the sense that everyone is free to run his head against a brick wall, if he pleases…If he does it, it is his own fault; and he has only himself to thank for the consequences'

Lord Denning MR in *Froom v Butcher*

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- Recent authorities conflict with each other
- For example, the case of *Smith v Finch* [2009] EWCH 53 QB appeared to add some clarity when Williams J, drawing upon the well-established authority of *Froom and others v Butcher* [1976] 1 QB 286 held at paragraph 44 and 45 of his judgment that….

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'It matters not that there is no legal compulsion for cyclists to wear helmets…there can be no doubt that the failure to wear a helmet may expose the cyclist to the risk of greater injury…I am satisfied on the balance of probabilities, that the cyclist who does not wear a helmet runs to risk of contributing to his/her injuries'

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- In reaching this conclusion, Williams J considered the facts of *Froom,* a case concerning the failure to wear a seatbelt before this became compulsory, to be analogous to the failure to wear a cycle helmet.

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Transient Certainty

- Similarly, in *Reynolds v Strutt and Parker LLP* [2011] EWHC 2263 QB, His Honour Judge Oliver-Jones QC (sitting as a High Court Judge) explicitly found contributory negligence in the failure of the Claimant to wear a cycle helmet. It was held at paragraph 45…

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'He was also aware that cycle helmets were available, if only by virtue of having seen his main rival wearing one and, in this respect, he was also contributorily negligent in his failure to protect himself from harm.'

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- *Reynolds* was a case in which the Claimant was on a work team-building exercise
- Twelve were participating in this exercise. Eleven of the twelve participants were not wearing cycle helmets.
- The Judge found that the participants were not required to wear helmets as such by the organisers of the exercise, but were merely made aware of their availability.

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A Return to Uncertainty

- In *Sinclair v Joyner* [2015] EWHC 1800 (QB), Cox J explicitly refused to find contributory negligence for the Claimant's failure to wear a cycle helmet.
- The Judge noted that although contrib was pleaded by the Defendant, it was not explored in evidence nor referred to in closing submissions.
- At paragraph 71, the Judge agreed with counsel for the Claimant's contention that…

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'no court has yet decided that failing to wear a helmet actually amounts to contributory negligence, although they have come close (see Smith v Finch [2009] EWHC 53 (QB)). In the present case the Claimant was an adult enjoying a bicycle ride in the countryside on a sunny day.'

- It is submitted that Cox J both erred in respect of her contention that contributory negligence was not found in *Smith v Finch* and in finding that no court had found contributory negligence stablished in respect of the failure to wear a cycle helmet (see *Reynolds v Sinclair* above)
- Contributory negligence was established in *Smith*. However, the allegation failed for want of causation.

- It is of course possible that *Reynolds* was not cited in argument before Cox J.

- *Phethean-Hubble v Coles* [2012] EWCA Civ 349 also merits consideration.
- This was a case in which the trial judge did not consider the absence of rear lights on the Claimant's bike nor his failure to wear a cycle helmet to be negligent when assessing the appropriate reduction to make for contributory negligence.

Causation

- The burden of course lies upon the Defendant to show that the failure to wear a helmet either caused or increased the severity of the claimant's injury.

- Causation is an issue which rewards careful, strategic consideration.
- Causation is self-evidently a strict question of fact.
- It should never be regarded as axiomatic that, had the claimant been wearing a cycle helmet, his or her injuries would have been less severe.
- Defendants are unlikely to succeed in showing this in the absence of medical evidence on the issue.

- Medical evidence is *almost* always indispensable to an allegation of contrib

Per Williams J in *Smith* at paragraph 55:

'*Both Dr Chinn and Dr Mills made the point that they are not medical doctors and that is a fundamental evidential omission. 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. There was no evidence to prove that any particular injury and residual disability was or may have been avoided had a helmet been worn*'.

When one is faced with a client with multiple head injuries which are likely to have distinct causal mechanisms, it is important to make life difficult for the defendant by putting them to proof as to which injuries it is alleged would have been avoided or lessened by a cycle helmet.

- This is especially important when a client has diffuse disabilities, e.g. motor and cognitive. Proving which disabilities were caused by the failure to wear a helmet is likely to be a fiendishly difficult task for the defendant.
- And, when assessing such evidence, the court's sympathies will more often than not lie with the claimant.

- For example, in *Phethean-Hubble* at paragraph 140 of the first instance decision:

'The Defendant has not discharged the burden of proof of showing that it is more likely than not that a significant albeit small part of the complex pattern of injury would have been prevented.'

- Detailed mechanical evidence is also likely to be of great significance in determining causation.
- Such evidence was decisive in *Smith* in which the expert gave evidence that even a modern, EU compliant helmet would have only protected the Claimant who hits the ground at speeds of 12mph or less.
- The Judge found as a fact that the Claimant struck the ground at a speed in excess of this and the Defendant's allegation of contrib failed.

No Easy Concessions

- For claimants, it is important not to prematurely concede that an allegation of contrib is likely to succeed at trial during settlement negotiations:

➢ Sometimes the allegation is pleaded by not pursued with any rigour.

➢ Sometimes the allegation is dropped at the door of court

The case law suggests that judges do not find allegations based on the failure to wear a cycle helmet very appealing and the defendant faces a difficult task in many cases of showing that injury would have been avoided or lessened.

Apportionment

- Section 1(1) of the Act requires that when both parties have been found to have contributed to an accident, the claimant's damages are to be reduced "*having regard to the claimant's share in the responsibility for the damage*".

- The apportionment of blame must not be made on a prescriptive 'causation' basis.
- It is not simply a case of finding as a fact that the claimant's injuries would have been 20% less severe had he or she not been negligent and applying that reduction to damages.
- What is required is not just an analysis of what Denning LJ called the '*causative potency*' of the negligent act, but also its '*blameworthiness*'.

- For example, in case A, the claimant cyclist with no helmet is knocked off his bike as a consequence of a failure to look over his shoulder before pulling out and he is hit by a drunk driver. Medical evidence shows that his injury would have been 50% less severe had he been wearing a helmet.

- In case B, the (helmetless) claimant cyclist is drunk. He is cycling along the wrong side of the road. He is hit by a driver who is also drunk. Had the driver been sober, he would have avoided the collision. Medical evidence in this case also showed that the injuries would have been 50% less severe had he been wearing a helmet.

- The apportionment of contributory negligence is likely to be less favourable to the Claimant in case B than case A. Although the '*causative potency*' of the failure to wear a cycle helmet was identical, the circumstances in case B were more '*blameworthy*'.

- Successful appeals against apportionment are rare.
- A recent example of a successful appeal is *Phethean-Hubble* in which the Court of Appeal held that the trial judge was wrong to find that a 16 year-old is not to be treated as having equivalent road-sense to an adult.

THE END