COMMENTARY ON CONTRIBUTORY NEGLIGENCE CASES SUBSEQUENT TO *SMITH*

***Phethean-Hubble v Coles* [2011] EWHC 363 (QB); [2012] EWCA Civ 349 (CA)**

A decision of His Honour Judge Wilcox sitting as a Deputy Judge of the High Court upheld in all essential respects by the Court of Appeal.

On 28th November 2005, Tobias Phethean-Hubble, then aged 16, suffered severe brain injuries when he was cycling and came into collision with a Rover motor car driven by the then 17 year old Sam Coles.

Tobias's cycling was not above criticism; immediately prior to the collision he was cycling at 8pm unlit along the pavement and moved onto the carriageway of the road into the path of the Rover. The street was, however, well lit and Sam had no difficulty seeing Tobias. The failure to carry lights at night therefore only affected the outcome to the extent that it may explain why Tobias had been riding on the pavement, where the Judge observed that 'strictly' he should not have been.

The area was subject to a 30 mph speed limit. At trial there was an issue over speed with Sam accepting a speed slightly in excess of the speed limit and those representing Tobias alleging a rather greater speed. In the event the Judge found that the speed was 35 mph and found Sam to be liable for Tobias's injuries because of his excessive speed.

The Judgment is progressive in that it accepts the dangers of speeding and emphasises the vulnerability of the cyclist. There was a finding that a reasonable motorist ought to have anticipated that the cyclist riding on the pavement would move into the road and a prudent motorist should have been prepared for such an eventuality and driven accordingly.

Driving 'accordingly' essentially meant moderating his speed. At 35mph there was no chance of avoiding the collision, he should not merely have been driving within the speed limit but should have slowed to 3-4 mph or so below the limit. At that speed there was a greater likelihood that the cyclist would have become aware of the approaching car in time, and the motorist would have had longer to react so as to avoid the collision, or at least cause less serious injury. Emphasis was placed on the significant difference between the two road users. One a cyclist with little protection, the other a motorist in a stable enclosed vehicle that has fatal potential.

The Judge also found fault on the part of the cyclist in riding onto the road creating the emergency. He found this was an equal cause of the accident but given Tobias's age he considered a reduction of one third for contributory negligence was just and equitable.

There was in addition criticism of Tobias for not wearing his cycle helmet. The Judge accepted as his starting point the words of Griffith Williams J in *Smith v Finch* who had likened fault on the part of a cyclist not wearing a helmet to fault on the part of a motorist for not wearing a seat-belt. On the face of it this is another blow for those who wish helmet wearing to be a matter of personal choice rather than external prescription. However the authority of the decision on this point is weakened by the fact that the contrary High Court authority *A v Shorrock* was not cited to the Judge and, rather extraordinarily, it appears that it was not even argued on Tobias's behalf that he was not at fault in leaving his helmet at home. As it was, the Judge made passing reference to risk compensation and to the fact that helmets may sometimes make injuries worse; suggesting a distinct possibility that he may not have followed *Smith v Finch* had the matter been argued out.

As is usual in cases of severe impacts, the finding was then made that the wearing of a helmet would not have made a significant difference to the extent of Tobias's injuries.

Comment. Although Claimant cyclists can usually be fairly confident that a Defendant motorist will be unable to establish that a helmet would have made any difference, this is not a good reason to permit assertions that a bare-headed cyclist is at fault to go uncontested. It is inimical to the interests of cyclists generally to allow a series of cases to build up on a premise that not wearing a helmet equates to fault. I hope that this is the last time that such an assertion will be allowed to go unchallenged.

Aside from the helmet issue though there is much in the Judgment about the standard of care owed to cyclists by motorists and about the dangers of even 'moderate' speeding to merit a cheer. The Judge is to be applauded for taking into account the potential to do harm to others.

The Defendant's appeal against this Judgment was heard on 28.11.11 and the Judgment of the Court of Appeal was handed down on 21.03.12.

In the Court of Appeal, both sides appealed the Judge's findings that Sam’s speed had

been 35 mph (though the Claimant's argument that the finding should have been of faster speed was more muted than the Defendant's that the finding should have been slower). Sam had originally told the police that his speed was 'about 35mph' *[My comment: an odd thing to say to a police officer about your speed in a 30 mph area if, as subsequently claimed, he was in fact travelling at 30 mph, unless there is some cultural norm among motorists that a few miles an hour over a speed limit is really quite acceptable]*. Perhaps therefore it is not surprising that (whatever the problems with trying to cross check this with the physical evidence) this finding was upheld.

Next, the Defendant attacked the Judge's finding that a safe speed in the circumstances was 26/27 mph. Again, though with 'considerable anxiety' the Court of Appeal upheld this finding. *[My comment: it would have been an easier finding had the Judge been more, rather than less, ambitious. In the context of his finding that Sam should have anticipated that Tobias might ride into the road, slowing to 20mph might have made some meaningful difference. The Court's anxiety appears to have related to this fine tuning of a figure so close to the speed limit. But this perhaps endows the speed limit with too much importance. The determination of a safe speed depends upon the circumstances; it will very often be slower than the limit (and even according to some of the older cases higher than the speed limit). At all events the Judge's finding was that Sam should have been going some 20% slower than he was].*

The next point was the one of greatest danger for Tobias; that was, would the slower speed have made any difference? The Judge had, at best, expressed himself unsatisfactorily when talking about 'likelihoods' when our law of causation requires these matters to be determined on the balance of probabilities. The finding more happily expressed would be that it is more likely than not that had Sam been travelling at 26/27 mph, the collision would not have happened. The Court of Appeal accepted that that is what the Judge meant and upheld his decision that Sam's excessive speed had caused Tobias's injuries. Perhaps the most important observation to be derived from this case is that the burden of proving that Tobias's injuries would have been of similar severity even had Sam been travelling at a safe speed rested on the Defendant. Once the Claimant had established that the Defendant was in breach of his duty of care and that the Claimant had sustained an injury of the kind likely to

be caused by that breach then it is incumbent upon the Defendant to disprove causation. That is potentially a significant development of the law which may be of real assistance to cyclists (and other injured Claimants).

Finally the Defendant appealed the Judge's finding that the level of contributory negligence should be one-third. The Judge had said that the degree of contributory negligence would have been one half but that it was just and equitable to reduce it because of Tobias's age. The Court of Appeal agreed with the Defendant that there was no reason to treat Tobias as if he were anything other than an adult in this respect and allowed the appeal to the extent of increasing the contributory negligence from one third to one half.

Reynolds v Strutt & Parker LLP [2011]EWHC 2263

The issue of contributory negligence on the part of a cyclist for not wearing a cycle helmet arose in unusual circumstances in this case. Judgment was delivered by His Honour Judge Oliver-Jones QC (sitting as a deputy Judge of the High Court – and apparently sitting in the Chancery Division!). The case has, in addition, implications for those who organise cycle races.

Mr Reynolds brought what, on the face of it, might be thought an ambitious claim against his employers for not making him wear a cycle helmet so as to protect him from the consequences of his own recklessness when taking part in a cycle race. The cycle race was organised by Mr Reynolds's employers, a well known estate agency, and formed part of a social afternoon of team bonding. As part of the fun, Mr Reynolds and his co-workers were not told of the nature of the day's events until they arrived at the site where the activities were to take place.

The race was between only four competitors and took place on a 3.5 km, 6 to 8 metre wide, closed road racing circuit at Fowlmead Country Park (built on the site of the former Betteshanger Colliery near Deal, Kent.)

Much of the Judgment is taken up with a discussion as to whether there was an

adequate risk assessment with what appears to be an assumption all round that such an assessment should require the use of helmets. The Highway Code recommendation about helmets is not of course directly relevant since the race was not on the Highway. Instead there was reference to a Health and Safety Executive recommendation that cycle helmets be worn. Unfortunately the Judge does not indicate where this recommendation is to be found. Some of the witnesses clearly thought that there was a relevant HSE recommendation. At one point the Judge refers to 'the recommended use of helmets by the HSE, which itself was, in my judgment ignored' and at a later point that one witness ought to have discussed with his colleagues 'what was said to be an HSE recommendation for the use of helmets'. There appears to have been a very curious failure to get to the bottom of what the HSE did recommend and how. I am not aware of any HSE guidance on the topic.

Possibly the rather sketchy consideration as to whether helmets should be worn is explained by the fact that the Claimant's case against his employer depended upon proving that they were in breach of duty in failing to provide a helmet and the employer was in turn running a contributory negligence argument that Mr Reynolds was at fault in not wearing a helmet. Furthermore on the Defendant's version of the facts they had advised Mr Reynolds to wear a helmet. There was nobody there then to interfere with the cosy consensus that helmets should have been worn.

Obviously the competitors themselves did not have helmets (or presumably any other cycling kit) as they did not know they were going to be racing until they got to the Park. The Park had some helmets and, on the Judge's findings, when presented with their bicycles the twelve competitors were told that helmets were available, but were not encouraged, still less required, to wear them. Apparently only one of the 12 competitors in the event wore a helmet. The deeply unattractive prospect of putting on a helmet in which somebody else has raced does not appear to have struck anybody in Court.

The 12 racers were split into groups of 4 who competed, as two teams of two, in heats so the race in which Mr Reynolds was injured started as a four horse race. It appears that Mr. Reynolds led much of the way but the tactically more savvy colleague, one Mr Cracknell, looked like passing him in the sprint for the line. The Judge found that

Mr Reynolds then made a deliberate decision to prevent Cracknell passing him and forcing him to brake. ‘He was making a deliberate decision to behave in an aggressive manner, reckless as to the consequences.' As every racing cyclist knows the deliberate blocking of a rival, especially in the sprint is, absolutely not on, highly dangerous and almost certain to end in disaster. So it was in this case: Mr Cracknell was fortunately uninjured (had he been injured he could presumably have sued Mr Reynolds); Mr Reynolds unhappily was injured sustaining a serious brain injury.

Causation was addressed in as perfunctory manner as the assumed need to wear a helmet and for similar reasons. The Defendant did not have an expert at all and the Claimant had no medical evidence (described as a fundamental evidential omission by Griffith Williams J in Smith v Finch). The Claimant did have evidence form Dr Bryan Chinn (the same expert who gave evidence for Mr Smith to the effect that a helmet does not protect in a high speed impact). On this occasion he gave evidence that a helmet would have helped because the speed with which Mr Reynolds’s head struck the ground was within the range where use of a cycle helmet was effective. There was, however, a notable absence of a finding as to the speed at which Mr Reynolds’s head did strike the ground, and it seems improbable that it was less than the 12 mph standard to which helmets must conform. Possibly with an eye to the argument to be run that Reynolds was himself at fault in not wearing a helmet the Defendant ultimately conceded that the absence of a helmet was causative of some injury (how some injury differed from the actual injury was not further explored).

These findings of breach (carelessness) and causation were necessary both for a finding of liability against the Defendant employer for not encouraging/requiring the Claimant to use one of those proffered helmets and also for a finding of contributory negligence against the Claimant for not wearing one of those helmets. The ultimate division of responsibility was one third (Defendant employer) and two thirds (Claimant Mr Reynolds) so that the Claimant recovers one third of the dmages he would have got if the Defendant was wholly liable. Given that Reynolds had deliberately and recklessly blocked his opponent one has to assume that the deduction for not wearing a helmet was marginal compared to the deduction required for deliberately reckless cycling (the two elements were never separated out).

For reasons expressed above the Judgment is not really a satisfactory authority for anything. It will perhaps reinforce upon race organisers a need for a risk assessment to contain provision for requiring the use of cycle helmets. It has no sensible bearing upon the situation where a motorised vehicle collides with a cyclist.

Final thought: is it better that people race without helmets or that they do not race at all; a consideration relevant to section 1 of the Compensation Act 2006? The Judge thought requiring helmets would not put people off taking part in this type of recreational activity; maybe not if you have your own helmet.