Treatment of cyclists in Australian negligence cases from 1992-2002

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Introduction

Cyclists on bicycles are frequently involved in accidents on the road which may give rise to actions in negligence for damages for personal injury. Bicycles are different from other vehicles on the road in a number of ways – they are smaller and more vulnerable than most other vehicles, they are often ridden by juveniles and in such cases may behave more erratically than other vehicles on the road; bicycle riders do not have to have a licence in order to ride on the road.

This report examines some of the patterns which can be discerned from an examination of the 26 negligence cases involving cyclists on bicycles in Australian jurisdictions between 1992 and 2002 which have been reported. Because these are legal cases, each involved a written judgment by a judge, which means that it was possible not only to report on the outcomes of the cases, but also to qualitatively analyse the words used in their judgments in those cases. This allows some indications of the attitudes which may be operating in relation to the consideration of negligent behaviour both by cyclists and affecting cyclists. It is worth noting that the small number of cases does not reflect the number of accidents involving cyclists nor does it reflect the number of cyclists injured on the road. The nature of litigation and the negligence action itself is such that this only reflects those cases which completed the entire process of going to court. Cases settled by insurance companies or other defendants necessarily are not available (settlements being confidential) and similarly those who have decided injuries are not sufficiently serious or fault cannot be proved will not initiate legal actions at all. Cases involving the category of negligence known as manufacturers' liability are not discussed.

To prove an action in negligence the plaintiff must prove that the defendant acted unreasonably and that this caused the harm suffered (was at fault). In some situations the defendant may be able to argue that the plaintiff also acted unreasonably in the circumstances (was contributorily negligent). Where the plaintiff has been contributorily negligent, any damages awarded to the plaintiff will be reduced by the percentage the plaintiff has been held to be at fault. In the cases discussed cyclists were both plaintiffs and defendants in accidents involving other cyclists, motor vehicles and pedestrians.

I. Case paradigms

The cases can be categorised according to the basic facts behind the action. Those case types are as follows:

A. Erratic behaviour on the part of the cyclist

This is the most common case type. Of the 26 cases considered, 11 fitted into this category. The defendant was in all cases driving a car involved in a collision with the plaintiff. Unsurprisingly, the defendant was found not have acted negligently in seven of the eleven cases[1]. In the remaining four[2],

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[1] *Arnold v Holden* (Unreported, NSWCA, 22 October, 1998); *Fontana v Morgan* (Unreported, NSWCA, 7 September, 1998); *La Corte v Hemmingsen* (1998) 27 MVR 5 (SCWA); *Lin v Melia* (1999) 30 MVR 165 (NSWCA); *Lockhorst v Aaron* (Unreported, NSWCA, 17 June 1996); *Skipper v Boertien* [1999] NSWCA 220; *Spanswick v Laguzza* [2002] NSWCA 103.

[2] *Congdon v Mercer* [1999] SASC 16; *Howlett v Campion* (2000) 30 MVR 393 (NSWCA); *White v Atkinson* 16 MVR 104 (SCSA); *Yip v Zreika* [2001] NSWCA 446.

the defendant was found negligent, with contributory negligence on the part of the plaintiff in all cases, ranging from 20% to 70%.

B. Cases in which the cyclist claimed negligence on the part of the body responsible for the construction of the road.

Three of the cases were of this type. One case was dismissed[3], one was allowed[4], but on alternate grounds (the plaintiff was successful against the driver of the car, but not against the authority responsible for the safety of the road). In the third case[5], the plaintiff succeeded, although he was found to have contributed to the accident in the order of 25%.

C. Cases in which the cyclist (invariably a child) rode into the path of an oncoming vehicle.

Six of the cases adhere to this paradigm. In all cases the child unexpectedly rode from a driveway or the footpath, into the path of the defendant's vehicle. At first blush, this would tend to suggest that the driver had very little opportunity to avoid the cyclist. Counter-intuitively, in all six cases, the plaintiff was successful. In one case, the plaintiff was found not to have contributed to the accident[6], whereas in the remaining cases, the plaintiff was found contributorily negligent in the order of 10-25%[7].

D. Cases in which the driver hit the cyclist while exiting a driveway.

The results in the two cases of this type were quite divergent. In the first case[8], the child plaintiff was successful, although he was found to have contributed to the accident in the order of 30%. In the second case, the adult plaintiff was unsuccessful[9]. A detailed exposition of these judgments appears subsequently.

E. Cases in which the driver collides with the cyclist from behind.

There were two cases of this type. In both, the plaintiff succeeded. In the first case[10], the plaintiff was not found to have contributed to the accident, whereas in the second, damages were reduced by 50%.

F. Other cases.

Two of the cases did not conform to any of these categories. In the first[11], the plaintiff was cycling in a velodrome with a grassed area in the centre of the track, on which teams of touch footballers were competing. One of the participants (the executrix of whom was the fourth defendant) inadvertently walked in front of the plaintiff, the collision resulting in his death. The plaintiff also sued the owner of the velodrome, the secretary of the touch football association and the NSW touch football association, for the resulting nervous shock. He was successful in his action, although he was found to have contributed to the accident in the quantum of 25%.
In the second case[12], a case which reached the High Court, the plaintiff was a pedestrian who collided with a courier on a bicycle, whose identity could not be ascertained beyond the fact that he was wearing a bib emblazoned with the logo of Crisis Couriers. The plaintiff sought to show that the

[3] *Haisman v Albury Wodonga Development Corporation* (Unreported, NSWCA, 18 April 1997).
[4] *Beare v Adelaide Hills Council* (2001) 34 MVR 220 (SCSA).
[5] *Indigo Shire Council v Pritchard* [1999] VSCA 77.
[6] *Horne v State of Qld* 22 MVR 111 (QCA).
[7] *Griffiths v Wood* 19 MVR 218 (SCSAFC); *Gunning v Fellows* (Unreported, NSWCA, 11 February 1997); *Johnson v Johnson* (1998) 27 MVR 64 (SCTas); *Low v Cooley* (Unreported, NSWCA, 16 April 1997); *Omrcen v Paxman* (1996) 24 MVR 469 (SCQ).
[8] *Karydis v Harriss* [2001] SASC 321 (SCSAFC).
[9] *Stepasuik v NRMA Insurance Ltd* (Unreported, NSWCA, 18 September 1996).
[10] *Patorniti v Carter* (1997) 25 MVR 429 (SCQ); *Zilm v Botten* [1993] SASC 4266.
[11] *Canterbury Municipal Council v Taylor* [2002] NSWCA 24.
[12] *Hollis v Vabu P/L (t/as Crisis Couriers)* (2001) 181 ALR 263.

courier was an employee – as distinct from a contractor – of Crisis Couriers and as such, that the company was vicariously liable for the negligence of the courier. The plaintiff succeeded on this basis.

II. Court treatment of plaintiffs by age

In ten of the 26 cases, the plaintiff was a child under the age of 18. Although the plaintiff in *Taylor*[13] was a 17 year old, his considerable experience with cycling rendered him an adult in the eye of the law. He was thus considered an adult for the purposes of this analysis. Of the ten cases, two plaintiffs (20% of cases) were entirely successful[14], whereas two (20%) were unsuccessful[15]. Six (60%) were successful, although they were found to have contributed to the accident in the order of 10-30%[16].

By contrast, of the sixteen cases in which the plaintiff was an adult (included in this is the case of *Hollis,* in which the cyclist was an adult, albeit a defendant), the plaintiff was entirely successful in three cases (19%), unsuccessful in seven cases (44%), and partially successful in six cases (37%).

These figures, prima facie, suggest that the courts treat juvenile plaintiffs far more favourably than adult plaintiffs. This is true to some extent, although the nature of the cases brought by juvenile plaintiffs is generally quite different to those brought by adults. This issue will be considered subsequently, amongst other pertinent issues.

[13] See 11.
[14] *Griffiths v Wood* 19 MVR 218 (SCSAFC); *Horne v State of Qld* 22 MVR 111 (QCA).
[15] *Arnold v Holden* (Unreported, NSWCA, 22 October, 1998); *La Corte v Hemmingsen* (1998) 27 MVR 5 (SCWA).
[16] *Gunning v Fellows* (Unreported, NSWCA, 11 February 1997); *Howlett v Campion* (2000) 30 MVR 393 (NSWCA); *Johnson v Johnson* (1998) 27 MVR 64 (SCTas); *Karydis v Harriss* [2001] SASC 321 (SCSAFC); *Low v Cooley* (Unreported, NSWCA, 16 April 1997); *Omrcen v Paxman* (1996) 24 MVR 469 (SCQ).

III. Is the treatment of cyclists inherently different to that of pedestrians or drivers?

In relation to adult cyclists

Certain statements made throughout the course of the judgments suggest that cyclists are generally treated less favourably than pedestrians or drivers.

This point is aptly demonstrated in *White*[17]. In that case, the defendant car driver proceeded across the front of a bus, after being invited to do so by the bus driver, in an effort to turn left from the right hand lane at an intersection. The plaintiff cyclist was passing on the inside lane of the bus, such that neither the driver of the car, nor the cyclist could see each other. The plaintiff unsuccessfully appealed the finding of the trial judge, that both parties were equally negligent, resulting in a 50/50 apportionment of responsibility. During the course of his judgment, King CJ stated[18]:

'The respondent, it is true was making a left-hand turn from a land other than the inside lane. It must be remembered however, in fairly assessing his degree of responsibility, that he had been tacitly invited to do so, by the driver of the bus which was occupying the inside lane. He was responding to that invitation in a traffic situation which drivers, *and I think this is common experience,* not uncommonly are forced to adopt unusual manoeuvres in order to cope with the exigencies of very heavy traffic….The appellant was riding in a position on the road which is commonly occupied by bicycles, namely on the inside of a vehicle in the inside traffic lane…'[emphasis added].

The Chief Justice encapsulates the preference in attitude toward a driver undertaking a commonly performed, yet somewhat dangerous manoeuvre, which is also counter to the rules of the road, as compared to the attitude toward a cyclist performing an equally common, yet inherently safer 'manoeuvre' (if it can be called that, as the plaintiff was proceeding down the road without diverting his course, well within the boundaries of the rules of the road). In dismissing the appeal, their honours apportion equal responsibility to a cyclist who fails to take care that a vehicle is not infringing road rules by cutting across the lane which he occupies, and a driver who deliberately cuts across the lane without considering the possibility that a cyclist may be travelling in that lane. This is not to suggest that the driver was grossly negligent; rather it appears as though, under the circumstances, the 50% apportionment with the cyclist is excessive.

There are many social psychological principles which explain this phenomenon, centred around the proposition that people are more inclined to view positively an act which they themselves perform regularly.[19]

The implicit preference for persons on foot over cyclists is best demonstrated in the reasons for judgment of Barr J in *Taylor v Canterbury Municipal Council*[20]. A precis of the facts of the case appear earlier. In determining that the deceased with whom the plaintiff had collided had not been negligent, Barr J stated [at 103]:

> 'It is impossible to find out how much time elapsed between [the defendant's] standing beside the track, moving onto it, and then being hit, but it must have been very short. While he was undoubtedly careless and inattentive, therefore, it is proper I think to regard his carelessness and inattentiveness as momentary…I think that he was not intent on moving in any particular direction or for any particular purpose and that he did not realise how close he was to the cycle track'.

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[17] See 2.

[18] At 2 (of the extract in the Bicycle file).

[19] The psychological principle of 'belief in a just world' may explain the phenomenon of treating more leniently the party with whom a judge can identify most easily – in this case, the driver of a car, rather than a cyclist. Lerner (1977) demonstrated that accident victims are treated more leniently where the judge is able to identify with them, thereby maintaining his or her perception of a 'just world' in which 'bad things only happen to bad people'. : Lerner, M.J. (1977). 'The justice motive: some hypotheses as to its origins and forms'. *Journal of Personality and Social Psychology, 28,* 129-137

[20] [2000]NSWSC 1093 particularly at 103.

This reasoning is weak at best. His Honour admits that the defendant was 'careless and inattentive', but fails to find him contributorily negligent. The fact that he was not intent on moving in any particular direction should have no bearing on his liability. His failure to recognise his proximity to the track merely emphasises that he had not employed the requisite degree of care in preventing such an injury. The only explanation for His Honour's finding is that the nature of the cyclist's motion as both rapid and directed (two necessary characteristics for cycling in a velodrome), counted against the cyclist. This suggests an inherent bias against the cyclist, a view confirmed by the Court of Appeal, which overturned Barr J's finding, attributing the defendant with 25% liability for the accident[21].

In relation to juvenile cyclists

Judicial treatment of juvenile cyclists is more favourable. In all cases, the principle in *McHale v Watson*[22] that the standard of care expected of a juvenile is that which could be expected of an objective person of the same age as the defendant, is expressly applied. For example, in the case of *Horne*[23], the plaintiff, a thirteen year old girl was allowed by her school to ride a bicycle with defective brakes, the result of which was that she clipped the wheel of the bicycle in front of her, ultimately falling into the path of a truck. The trial judge apportioned the blame 75/25 in favour of the appellant, ruling that she should have dismounted and pushed her bike the remainder of the distance upon realising that the brakes were faulty. The plaintiff successfully appealed to the Queensland Court of Appeal, which ruled that she had not been contributorily negligent. In the course of his judgment, Davies JA stated:

> 'In the case of an adult plaintiff in such a situation, a defendant might with some justification argue that the plaintiff ought to have dismounted, taken her bicycle to the footpath and wheeled it to the tennis centre. Such a submission, in my view, loses such substance as it would otherwise have when directed to a 13 year old finding herself in a heavily trafficked area with vehicles overtaking her.
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> I do not think one can be so critical of one so young…
>
> The evidence did not, in my view, justify a conclusion that the defect in the brakes was such that some appreciable time before the collision occurred, a reasonable 13 year old riding a bicycle would have decided that it was unsafe to continue and would therefore have stopped at the kerb, dismounted and wheeled her bicycle the balance of the distance to the tennis centre'.

This reduced standard of care is of course not unique to child plaintiffs who are involved in accidents while riding a bicycle.

One additional point must be made. The courts often justify a finding of negligence on the part of a driver, by stating that the driver should have known that there may have been children in the vicinity[24]. This is best demonstrated in the case of *Karydis*[25], where the plaintiff, a 15 year old boy was riding his bicycle on a footpath when he collided with a car which the defendant was edging out of his driveway. In the course of their judgment, Prior ACJ, Williams and Bleby JJ stated [at 9]:

> 'In the present case the accident occurred 800 metres south of the Henley Beach High School where the school day starts at 8.50am. The accident occurred a few minutes before this time as the respondent was riding to school. It was exactly the time at which passing school traffic should have been anticipated by the appellant who had lives at his same address for 18 years. He should have been well aware of the practice as regards riding bicycles on the footpath'.

This implies that the defendant was negligent in not taking sufficient care to prevent a collision between his vehicle and a bicycle being ridden by a child on the way to school, as was to be expected at

[21] See 11.
[22] (1966) 115 CLR 119.
[23] See 6.
[24] E.g., in *Griffiths v Wood* (1994) 19 MVR 218 per Matheson J: '
[25] See 16.

that time of the morning. The question must be asked; would the plaintiff have succeeded had he been an adult? The court-imputed state of mind of the defendant driver should not have been different – he should still have apprehended the possibility that a child cyclist may have passed the driveway on the way to school. But the very fact that the bicycle with which the defendant collided, was ridden by a child seems to have given the court its basis for finding negligence.

To strengthen this assertion, in *Stepasuik*[26], the facts were virtually identical; the plaintiff cyclist collided with the car of the defendant, who was reversing out of his driveway. The evidence suggested that the car was moving at 5km per hour, which was faster than the 'edging' out of the driveway attributed to the defendant in *Karydis.* The two differences were that the plaintiff was an adult and that the time of day was between 5.50pm and 6.10pm. In contrast with *Karydis*, the plaintiff's case was dismissed. The court declined to find that the defendant had failed to keep a proper lookout.

Karydis is not the only case in which the status of the plaintiff as a child cyclist appeared to give the court its reason for finding negligence on the part of a driver. The same occurred in *Griffiths*[27], where a six year old was playing on a bicycle in a car park in a country town. He rode out of the park across the street in the path of an oncoming semi-trailer travelling at about 50 km per hour. Again, it was decided that the defendant should have been aware that, based on the nature of the town and the fact that it was a Saturday morning, a small child may have strayed suddenly onto the street, and that in not driving accordingly, he had been negligent. Again it must be asked; would the plaintiff have succeeded if he had been an adult cyclist, performing precisely the same manoeuvre as the child plaintiff in this case (who incidently recovered full damages without a finding of contributory negligence)?

One final example is the comparison between the findings in *Yip*[28] and *Horne*[29]. In both cases, the ultimate cause of the collision between a car and a bicycle was the absence of working brakes on the bicycle. In the former case, the adult plaintiff was found 50% contributorily negligent, whereas in the latter, the child plaintiff was not found contributorily negligent.

The conclusion must be that the status of the plaintiff, as a child or an adult, has a significant bearing on the court's justification of finding negligence on the part of the defendant. The term 'failing to keep a proper lookout' as used to determine whether the defendant breach his duty of care, seems to be applied strictly where the plaintiff is a child, and less so where the plaintiff is an adult cyclist.

IV. Prima facie preference for smaller vehicles?

In *Congdon*[30], the plaintiff appealed a finding that he had been 70% contributorily negligent, by arguing that culpability should lie chiefly with the vehicle with the capacity to cause the most damages – in this case, the defendant's car. Perry J considered this submission in relation to a statement by Balkin and Davis[31], that '[W]here the collision is between a semi-trailer or some other juggernaut and a bicycle, even if the driver of each made an equal contribution to causing the collision, it would nonetheless be just and equitable to apportion less responsibility to the rider of the bicycle'. His Honour stated [at 35] that 'some reference can and should be made to and allowance given, for the relative capabilities of each of the vehicles to cause damage. But I do not think that it can be put in such an absolute way…'.

Thus, in general, where the parties are equally culpable, the nature of the vehicles involved may have some bearing on the outcome. Where the cyclist is manifestly more responsible for the accident, other considerations are paramount, and the court will not apply this over-simplified rule.

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[26] See 9.
[27] See 14.
[28] See 2.
[29] See 6.
[30] See 2.
[31] The Law of Torts (1991). Butterworths Publishing at pp356-357.

V. Is the entitlement of cyclists to use the road treated as equal to that of motorists?

In *Indigo*[32] the plaintiff rode onto a timber bridge, failing to adhere to the smallest of three signs which warned 'BEWARE OF GAPS IN BRIDGE DECK – CYCLISTS DISMOUNT'. The front wheel of his bicycle descended into one of the gaps between the planks , throwing him forward, resulting in various neck injuries. The trial judge found that despite the fact that the third sign was much smaller than the others, and that it was placed extremely close to the start of the bridge, the plaintiff should have dismounted his bicycle and was accordingly held 60% liable for the accident. The defendant council appealed, and the plaintiff cross appealed this finding. The plaintiff succeeded on the basis that he had the same right to use the bridge as motorists, and it was the duty of the council to repair the bridge, rather than to prevent cyclists from using the bridge at all. In the absence of an adequate warning, the cyclist was found to have an equal right to use the bridge, the result of which was that his contributory negligence quantum was reduced to 25%.

Of interest in this case is the contrast between the ruling of the trial judge and the Victorian Court of Appeal. Charles JA, with whom the other judges agreed, found that it was not unreasonable to expect the council to keep the bridges in good repair. There were only eight such bridges in the Shire, with five methods of maintenance available to the council. Their Honours found that it was reasonable to expect the council to repair and maintain the bridges, rather than to deter people from cycling on them due to their structural deficiencies. Charles JA stated [at 28]:

> 'I disagree that the solution was to endeavour to ensure that people did not ride on the bridge rather than spending money to close up the wider gaps. There are plainly foreseeable situations in which an even larger and adequate warning sign would not have prevented a cyclist from riding onto the bridge'.

Implicit in the Court of Appeal's reasoning, as distinct from that of the trial judge, is the recognition that cyclists are legitimate road users and that it is valid to expect that council maintains its road / bridges for the purposes of cycling, rather than implementing the somewhat less costly alternative of preventing cyclists from using roads or bridges owing to their structural deficiencies or lack of repair.

VI. The variable application of the test of 'keeping a proper lookout'

The courts generally find negligence where the parties have failed to keep a proper lookout and have thus not met the requisite standard of care. The application of this test to bicycle riders is highly variable, on occasion resulting in mutually inconsistent outcomes.

To illustrate this point, several contrasting cases follow:

Firstly, in *Arnold*[33], the plaintiff, a 14 year old girl, was struck by a car travelling in the same direction, when she veered into the path of the car. The bulk of the evidence came from a Mrs Hull who was travelling immediately in front of the defendant. She claimed that despite the erratic behaviour of the plaintiff, she did not perceive the necessity to slow down. This was the basis for the trial judge's finding that the defendant had not failed to keep a proper lookout by continuing on at a constant speed.

This finding is supported by the statement by Meagher JA in *Spanswick*[34], that:

'A driver would be totally immobilised if he were in constant fear that the worst was about to happen to the vehicle in front of him'.

On the contrary, such a statement is inconsistent with the cases in which a plaintiff is found negligent for colliding with a small child on a bicycle who emerges from behind a parked car without warning.

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[32] See 5.
[33] See 1.
[34] See 1 at 9.

Examples include *Griffiths*[35] and *Gunning*[36], the former in which the 6 year old plaintiff succeeded without any finding of contributory negligence, the latter in which the 12 year old plaintiff was attributed with 25% of the liability. In the light of Meagher JA's statement, it is necessarily inconsistent that a defendant is found liable where the cyclist appears without warning, yet in another case, the defendant is absolved where the cyclist is riding erratically, in full view of the defendant.

Conclusion

This survey of the cases suggests that the cyclist is in an invidious position on the road. Courts are not quite sure whether they are 'fish or fowl' (motor vehicles or pedestrians). Although they have a legal right to use the road as a motor vehicle, courts appear to treat them as a sort of hybrid with less legitimacy on the road than either motor vehicles or pedestrians. Juvenile cyclists are given preferential treatment, which may be entirely legitimate since little can be expected of children (depending on their age) when it comes to the perceptual judgments and motor skills required to negotiate roads and motor traffic.

The conclusions which can be drawn from a small sample are limited. However, the fact that negligence law draws on the concepts of reasonable behaviour which derive from community understandings suggests that the treatment of cyclists by judges may well reflect community attitudes to cyclists. It is of interest that the treatment of cyclists by the judges in many of these cases reflects anecdotal report by cyclists that motorists treat them as non-legitimate users of the road. Any attempts to increase cycling activity whether for health, environmental or commuter reasons needs to take this into account.

[35] See 7.
[36] See 7.