“Blick” outlook for cyclists – ACT Court of Appeal upholds $1.7 million judgment

***Blick v Franklin* [2016] ACTCA 17**

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Charles Simon (Partner) and Michael Milton (Special Counsel) consider the recent ACT Court of Appeal decision in *Blick v Franklin* [2016] ACTCA17, which provides a tale of caution for cyclists, liability underwriters and defendants preparing expert evidence.

OVERVIEW

In an age of technology and ever present and varied expert analysis encroaching or seeking to encroach on the courts’ decision making, judges may still be willing to fill the evidentiary gap with perceived common sense.

The key points to take away from this decision are:

- Courts (or at least ACT courts) appear willing to impose an onerous standard of ‘reasonable’ care for cyclists to avoid obstacles (even where lighting is questionable).
- Whilst defendants may often seek to rely on a plaintiff’s failure to obtain certain expert evidence as a weakness in proving their case (and not obtain reports in response in the hope that they will simply not prove their case / avoid drawing attention to this failure), this may prove a risky strategy (in this case we understand a report was tendered by the defendant, but rejected).
- Even if the plaintiff does not, defendants may still need to tender persuasive expert evidence in cycling cases, including as to:
    - complex lighting scenarios - re-enacting the scene, where possible; and
    - stopping distances and actions taken by the reasonable cyclist (including as to whether side by side riding is appropriate and the likely outcome had reasonable care been taken).

Whilst the decision may still be subject to an application for leave to appeal to the High Court, it still remains of broad concern.

BACKGROUND

At 5.45pm after dark in winter on 17 June 2009, two cyclists were riding at approximately 25-27km/h in a dedicated bicycle lane in Capital Circle, with Mr Franklin (**Franklin**) beside or slightly behind Mr Blick (**Blick**).

Blick encountered, but did not see, a 6 to 8 foot long 1.5 inch square wooden tree stake lying across the path at an angle and rode into it, causing him to veer and collide with Franklin. The collision resulted in Franklin falling into the motor vehicle lane and being struck by a car, sustaining serious injury, although there was no allegation the driver was at fault.

Franklin succeeded in the first instance, with the ACT Supreme Court finding that Blick was negligent in failing to keep a proper lookout so as to see and avoid the stake, noting the evidence that:

- both bicycles had effective headlights;
- it was peak hour and there was significant passing traffic (at least two vehicles or probably more were approaching from behind) and the lights of those vehicles would have further illuminated the cycleway;
- the overhead street lights were approximately 40-45m apart and the police described the street lighting as good; and
- overall the area was extremely well lit according to the plaintiff.

Despite there being no expert evidence as to the available lighting or likelihood as to whether Blick could have avoided the stake in time had he seen it, the first instance judge concluded [at 72-3]:

> *'One thing is certain. This large piece of wood was lying on the cycleway directly in the path of the defendant's bicycle. The lighting in the area was good. Having seen the photograph of the piece of wood which was struck by the defendant, and bearing in mind the quality of the lighting at the scene and the moderate speed at which the defendant was travelling, I am satisfied on the balance of probabilities that the defendant would have seen the piece of wood in adequate time to take evasive action had he been keeping a proper lookout for objects on the cycleway. I cannot be satisfied that the piece of wood was positioned in such a way, prior to being struck by the defendants bicycle, that the plaintiff would have seen it had he been keeping a proper lookout….the defendant submitted that the plaintiff's case must fail as no expert evidence had been led by the plaintiff. In my opinion,* ***this is not a case which required such evidence****'* [emphasis added].

Blick was awarded approximately $1.7million, plus costs, with no deduction for contributory negligence.

APPEAL

Blick appealed on the basis that there was no breach and the determination and finding as to the available artificial light was flawed. It was contended that, in the absence of expert evidence, there had been no proper basis for the primary judge to make the findings on lighting and the reasoning as to causation was inadequate.

The Court of Appeal dismissed the Appeal and essentially found:

- there was adequate evidence to support the primary judge's finding on lighting and in relation to breach;
- whilst expert evidence may be relevant (and highly relevant in other cases), it was not essential or required in this instance;
- the role of common knowledge and common sense is a valid one: *'the lay evidence was sufficient to enable the primary judge to reach the conclusion he did using common sense';*
- as to causation: '*as avoidability was assumed and not put into issue in the trial, it was open to his Honour to conclude that [Blick]'s breach of duty caused the respondent's injuries'*.

The award of $1.7million plus costs was therefore upheld (with further significant costs).

IMPLICATIONS

In a country often well accused of being a 'nanny state', this decision may heighten cyclists alarm at the potential for being found liable for inadvertent accidents (for example, where attention was being paid to approaching cars rather than potential road obstacles). It may also encourage cyclists to wear 'go-pro' type camera devices to avoid these types of arguments down the track.

Additionally, with the ongoing emergence of cycling being a preferred mode of transport to and from work in many states, this decision is of importance to underwriters of cycling clubs, which provide liability cover to their members, as well as general home and contents insurers offering liability cover for household members.

Whilst some states have made it compulsory for cyclists to carry a license, we may now see reignited calls for cyclists to be insured through a compulsory third party scheme.

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