

# An Expert Witness in Cycling

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## Introduction

I first became involved in legal work in 1988. I lived in Milton Keynes at the time and a cyclist was killed using one of the town's cycle paths. I knew something of the circumstances that had led to the death and the representations that had been made about the hazards of the cycle paths, so I offered assistance to the deceased's family and their solicitor. I was asked to submit a statement and I subsequently learned that it had influenced the outcome and the compensation received.

Over the next four years I was asked by the solicitor for assistance after other cycle path crashes and I also helped cyclists directly to gain compensation following more minor incidents. Then one day the solicitor said that he thought I should be paid for my work – which until then had been voluntary – and he asked if he could recommend me for registration as an Expert Witness. I had no idea at that stage just what being an Expert Witness involved, but I agreed and in 1992 I undertook my first paid case, involving injury on the track around Rutland Water.

## What is an Expert Witness?

An **expert** is anyone with knowledge or experience of a particular subject beyond that to be expected of a layman. An **expert witness** is an expert who makes this knowledge and experience available to a court to help it understand the issues of a case and thereby reach a better informed decision.

It is for the court to decide whether or not a witness is an expert. Academic or professional qualifications are not a prerequisite, which is just as well as there are none for cycling. Practical experience and the relevance of the evidence presented count for much more.

The unique characteristic of expert evidence is that it is opinion evidence. Generally speaking, ordinary witnesses can only give evidence of fact. They can say, for example, that a vehicle hit somebody, but they may not say that it was being driven recklessly. That is for the court to decide, and the task of the expert witness is to assist the court reach its decision with technical analysis and opinion inferred from the factual evidence. An expert is not only allowed to give his opinion, he is expected to do so.

The overriding duty of an expert witness is to the court, irrespective of who pays him, and in recent years an expert's report in civil cases must include a declaration to that effect. So whether I'm engaged on behalf of a cyclist who has been hurt, or on behalf of an insurance company resisting a claim, the opinion I give on any particular matter must be the same.

When you write a report, you can usually broaden its scope beyond the specific instructions you are given if you think this necessary to cover all the issues you consider to be relevant, although you must address specifically the questions put to you by whoever instructs you. When it comes to giving evidence in court, however, you are much more restricted to answering the specific questions put to you and barristers will naturally phrase their questions to the best advantage of their client. That means that your perceived impartiality can be influenced by the questions you are asked.

An expert witness must never be an advocate, and judges are quick to disallow your evidence if you try to be – something I learnt early on at the expense of another expert who found himself harshly criticised. If a barrister fails to ask you a question you think should be asked, there's not much you can do about it, and their clients sometimes suffer because of that. Responsibility for seeing that justice is done on behalf of their clients rests with their solicitors and barristers - that is not a job for the expert witness.

## **What skills are needed?**

For cycling, an engineering or scientific background is helpful in analysing crashes and their causes. Knowledge about road design, traffic management and how the traffic system works are all important. Likewise, knowledge of the typical causes of cycling casualties, on and off road, and of how people cycle in practice and optimally. It is useful, too, to have an appreciation of how others respond to particular conditions: drivers on the roads, walkers on shared-use paths. You don't need any legal knowledge, but you soon gain a basic understanding of how the legal system works and that is very helpful.

## **Types of cases**

There are two types of litigation: civil and criminal.

Criminal cases are almost always brought by the Crown as a result of charges made by the police. If found guilty, you gain a criminal record and a conviction can result in a fine, community service, or imprisonment. Criminal cases against cyclists are rare and I have only been involved in three - one where a cyclist was charged with cycling recklessly after colliding with a pedestrian, and the other two involving the obstruction of traffic - one case being the ongoing one involving Daniel Cadden.

Cyclists may be involved in criminal cases brought against motorists, but only as witnesses of fact. The basis of these cases is law-breaking by the motorist which the police must prove supported, as necessary, by evidence from people who witnessed the event. As it is the motorist's behaviour alone that is being judged and not that of a cyclist or other person, and the yardstick is simply whether a law has been broken, it would be unusual for there to be a need for expert evidence on cycling and I have not been involved in any such case.

Civil cases do not involve the police, except as witnesses of fact, and they do not lead to any criminal sanction. The remedy is a financial payment from one party to the other, or both parties may be required to share responsibility proportionately as decided by the court. Civil action usually follows criminal action on order to award compensation, but civil action more often takes place on its own, such as when a cyclist claims against a highway authority for damages after being thrown by a pothole.

In civil cases, one or both sides may require support from one or more expert witnesses. However, the rules on the use of experts have been tightened in recent years to reduce costs and it is becoming common for courts themselves to appoint a single joint expert on behalf of both parties and to restrict evidence to the preparation of a report and not presence in court. In some cases I've been involved only as an advisor without undertaking any court-related work.

Civil cases are where counter-claims of contributory negligence arise, as the defence attempts to limit its responsibilities by claiming that action, or inaction, on the part of the claimant was in part responsible for the injuries suffered or their severity. I've been involved, directly or indirectly, in

more than a dozen cases involving the non-use of cycle helmets and several involving non-use of cycle facilities. It is in these cases, in particular, where good advice and good evidence are essential as many cyclists - sometimes on the advice of their solicitors - accept lower compensation than they should, because they are poorly informed about risk in these situations and have a fear of losing all. No court in the UK has yet been convinced that wearing a helmet or using a cycle path would have made any material difference to injury in the cases they have considered.

An important difference between criminal and civil cases is the burden of proof required to succeed. In criminal cases the prosecution must establish its case 'beyond all reasonable doubt'. In civil cases a less stringent test is applied and the plaintiff, or claimant, only has to prove his case on the 'balance of probabilities'.

## **What happens in court?**

Giving evidence in court can be quite an unnerving experience if you're not used to it and I really feel for people who are there for the first time. Although judges are usually sympathetic towards inexperienced individuals and the situation does seem to have improved since I first started, court proceedings remain adversarial and the defence witnesses employed by insurance companies and the like have the clear advantage of experience.

Each side puts its interpretation of the facts and in cross-examination challenges the other. Counsel for the prosecution or claimant goes first, calling first his witnesses of fact and then any expert witnesses. Then the defence witnesses are called. All witnesses have to take an oath before giving evidence. The judge (or magistrates in lesser criminal cases) may also ask questions as the proceedings go on and I usually find these questions a good indication of how open minded the judge is towards a case. At the end the two counsel sum up and the judge gives a verdict. The whole procedure is slow, not least because the judge makes his or her own notes by hand.

Because of the adversarial nature of court proceedings, you can expect to be challenged in cross-examination not only on the facts and your opinion but also on your integrity. This is quite a dispiriting experience as counsel attempts to portray your evidence as unreliable and prejudiced and your knowledge of the subject as so much weaker than that of other witnesses. In time you recognise this as par for the course and learn to stand your ground, but I still find it difficult to respond to spurious assertions in the most appropriate manner. Above all, you must never get upset or lose your temper.

## **What cases have I been involved with?**

I've dealt with a great variety of cases over the years across the whole of the United Kingdom. In about 80% of cases I've been engaged on behalf of a cyclist, but at other times by insurance companies, education authorities, a cycle shop and a mail order business.

By far the greatest number of cases have involved injuries sustained using cycle paths and off-road trails. Poor surfaces, upstands, bollards, falls on steep descents, head-on collisions due to poor sightlines, collisions with pedestrians and crashes involving cars at road crossings are examples. BMX and other recreational cycle facilities also seem to be particularly casualty-prone.

By comparison, road cases have been few, in part because responsibility is usually easier to resolve. Most have involved slips on manhole covers, drains, cattle grids, trenches and in one case there was a collision with a pedestrian.

A few cases have involved club cyclists riding together, usually where one rider has been thrown by a bad surface and others have crashed into him. Cycle equipment has sometimes been at fault: clipless pedals, forks snapping, a rider's trousers being caught in the chain.

As I said before, contributory negligence cases have concerned cycle helmets, cycle lanes and roadside cycle tracks. I once assisted a cyclist sued by a taxi driver for riding into the door of his cab which had been opened by a passenger in a stationary queue of traffic. The cyclist was using a cycle lane but it was asserted that he could have been expected to realise that it was too narrow to use safely. If that case had gone to court, the cyclist may have won, but he could not afford the cost of doing so and paid over £2,000 in compensation for which he was, fortunately, insured.

Outside the field of litigation, I have also been engaged by pedestrian and community organisations to prepare reports for public inquiries into sections of the National Cycle Network and other urban and countryside developments. In Cambridge, I recently did a report for Girton Parish Council into developer proposals concerning Girton Corner.

Two ongoing high profile cases concern the Highway Code revision and Daniel Cadden. As well as preparing the CCN submission to the Great Britain Highway Code, I was subsequently engaged to produce a detailed expert report on the Northern Ireland version, which is very similar. The implications of the proposed changes to the Highway Codes are far-reaching and are certain to result in a great increase in contributory negligence claims if they are not amended. Like the existing rule on wearing a helmet, the new rules to require cyclists to use cycle facilities are without good evidential support from a safety point of view; indeed, as the high proportion of cases I've dealt with involving cycle facilities demonstrates, more casualties are the most likely result. It may take some effort to get the Department for Transport's road safety unit to make changes, but cycling is going to get a lot less pleasant if it doesn't.

I probably can't tell you much more about the Daniel Cadden case than you know already. Daniel was charged with inconsiderate cycling because he held up 4 cars for a few seconds on a B road in Telford when he could have used a much less suitable cycle track. The appeal is still awaited. The case has attracted considerable interest and has repercussions well beyond cycling. Offers of support have come from eminent barristers and a Queen's Counsel. If the appeal doesn't succeed, cycling will be in big trouble.

## **Conclusion**

My experiences as an Expert Witness over the past 15 years have been a very interesting, and for the most part, an enjoyable experience. I have concerns about how fair our system of justice is, with its emphasis on an adversarial approach and an administration that leaves much to be desired, but in the majority of cases in which I've been involved the court's decision was probably the right one.

I've attended some hostile court hearings but also some very cordial ones, given the circumstances. And I found it an honour that on two occasions counsel representing the other side have approached me afterwards to sign copies of my book 'Cyclecraft', which does seem to enjoy the status of an authoritative work. There is a human side to the way the justice system works, but it's not always the most prominent.

Changes in recent years to the rules for litigation have, in my view, been largely beneficial. However, for cyclists the most worrying development has been the growth in counter-claims of contributory negligence. With regard to both helmets and cycle facilities, the underlying problem is the advice put

out by the Department for Transport and its poor understanding of the issues involved. As cyclists we must do all we can to get this changed.