Focus PERSONAL INJURY

A legal spin on the wheels of misfortune

David Hay

The Decade of Action for Road Safety began in 2011. It is a global plan conceived by the United Nations whose purpose is to "reduce the forecasted level of road fatalities by increasing activities conducted at national, regional and global levels."

One of the five pillars of the plan is "post-crash responses," which includes "effective legal response." The UN wants jurisdictions around the world to create better legal systems to deal with road safety.

The growth of cycling in Canada in the past decade, and the forecasted growth in the next, will challenge the country's legal systems to achieve a just response to the inevitable increase in cycling accidents associated with shared use of roadways.

In most jurisdictions in the world, cyclists and other vulnerable road users who suffer losses at the hands of negligent motorists are forced to prove fault. The onus of proof in a civil case applies to motorists and non-motorists alike. Injured plaintiffs must marshal the evidence to discharge this "onus of proof" on a balance of probabilities. The problem for cyclists and pedestrians is that because of their injuries, they often lack an accurate memory of what happened. Head trauma and amnesia are common, even with helmets. Without a clear recollection, cyclists are often put to the significant risk and expense of reconstructing the collision through experts. The cost of those post-accident investigations is borne by the cyclist, and if they cannot thereby prove negligence they can face financial disaster.

A few bike-friendly jurisdictions have recognized this injustice to the many innocent persons who lack the wherewithal to prove fault, and have reversed the onus of proof. In jurisdictions like the Netherlands and Ontario, it is accepted that automobiles are dangerous, and the legal onus to *disprove* negligence is on the motorist and/or its insurers.

Dutch road law recognizes the relative vulnerability of cyclists and the fact that motorists typically have insurance while cyclists do not. The Dutch regard the law as a simple means of leveling the playing field. When you crash with a cyclist in the Netherlands, you are liable as a matter of law, unless you can demonstrate that the incident was caused by circumstances beyond your control.

Ontario's *Highway Traffic Act* has imposed a reverse evidentiary onus on drivers who impact pedestrians on public roadways. By definition, both pedestrians and cyclists are the beneficiaries of this evidentiary rule. It has been in existence in similar form since 1912 and generates very little controversy.

In *Ireland v. McKnight* [2011] B.C.J. No. 222, Lionel Ireland, a Victoria, B.C. physician, suffered career-ending injuries in a bicycle collision on a two-lane, asphalt-surfaced roadway on Vancouver Island. He had no memory of events three days before and three days after the collision owing to a head injury, and could only advance a theory as to what happened. He alleged that the defendant driver failed to pass him at a safe distance and that she was wholly liable for the collision. The driver and her passenger denied this claim, arguing that as they were passing Ireland, he turned to look to his left and steered his bike directly into the side of the car. Ireland retained an engineer to try to reconstruct the collision, but ultimately his case was dismissed because he failed to meet the ultimate onus of proof. The trial judge found that the physical damage to the vehicle was not inconsistent with the defendant's version of events. In a short judgment, the B.C. Supreme Court judge indicated that if the plaintiff's allegations that he was passed at an unsafe distance were true, the front of the vehicle would have struck him first, not the back. As a plaintiff, Ireland was forced to bear the risk of non-persuasion and lost, with costs awarded against him. Had Ireland's accident occurred in the Netherlands, or even in Ontario, the trial on liability may have been quite unnecessary. The case of prima facie negligence against the motorist would have arisen by statute.

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> Richards Buell Sutton

If law is truly concerned about social policy, the notion of a reverse onus has merit. After all, there is something intrinsically uncivilized about an injured cyclist failing to recover compensation in circumstances where his or her ability to offer testimony about the defendant's conduct is destroyed by the conduct itself. Critical evidence as to what happened is often in the possession of only the defendant. Add to this the disparity in resources and this legal sauce assumes a distinct flavour of unfairness.

On the other hand, the division of opinion between cyclists and their motoring counterparts is at an all-time high. To an auto-centric society, it seems hardly the time to rock the political boat and push for a reverse onus, when many motorists already resent cyclists and their new-found legal assertiveness.

In the end, a legal system must be effective. With the growing population of cyclists, there will be a higher incidence of cases which face the prospect of an unjust outcome owing to an unfair evidentiary threshold. Unidentified drivers, head injuries, and fatalities are all features of our world to which the law of all jurisdictions must eventually fashion a proper response.

In my view, any civilized system of law should require the operator of a motorized vehicle to disprove negligence after a collision with a vulnerable road user.

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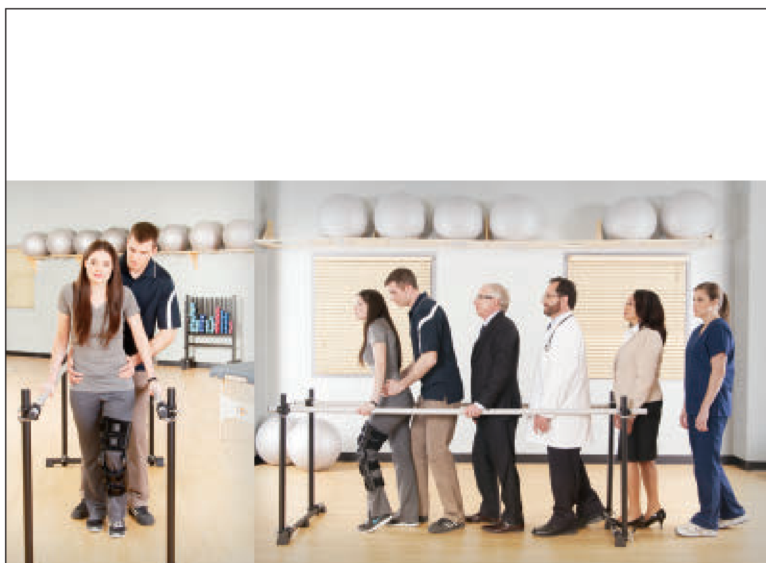

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