

Contributed articles

Letter to the Editors

It is time to consider a presumed liability law that protects cyclists and other vulnerable road users

James Holgate

Principal Associate, Martin Small Consulting, Melbourne, Australia

Corresponding Author: James Holgate, PO Box 229, Gisborne, Victoria 3437, Australia, james@martinsmallconsulting.com, +61 437 357 198.

The contribution of Boufous, S. (2017), It is time to consider a presumed liability law that protects cyclists and other vulnerable road users, *Journal of the Australasian College of Road Safety*, 28(4), 65-67, provides a thoughtful commentary on what is clearly a pressing need to provide a road traffic system that is safe for all road users and encourages healthy and sustainable modes. The author provides a case for the introduction of strict civil liability laws to encourage drivers to take more care to avoid cyclists, in turn providing a more fair and safe environment for cyclists.

Arising from this paper, there are two questions to be considered: one practical and the other ethical.

The practical question is whether the change will make a difference. The author provides evidence that strict liability will improve driver behaviour by reference to two studies. A paper from the United States (Maker, 2015) refers to experience in a number of European jurisdictions. The paper provides counter arguments, including a statement that many in the Netherlands are not aware of their liability laws (Maker 2015, p488) but couches these arguments as being promoted by “skeptics” or “critics”. Maker concludes that strict liability “...would create safer roads for cyclists.” (Ibid, p505). However, this conclusion appears to be based on subjective judgements such as: “*Even the automobile driver who does not care about the safety of the cyclist will surely care about the impact on his wallet*” (Ibid, p502) and comparisons with the application of strict liability for defective products – a quite different behavioural and organisational context. The second paper (Pucher & Buehler, 2008) examines the factors encouraging safer cycling in a number of European countries. It concludes that “... *the key to achieving high levels of cycling appears to be the provision of separate cycling facilities along heavily travelled roads and at intersections, combined with traffic calming of most residential neighbourhoods*”.

Against this limited evidence, one needs to consider the extensive body of understanding that is the basis of traffic enforcement systems. As described by authors such as Elliott (2008), deterrent theory suggests effectiveness is largely dependent on certainty of punishment. This is the basis of enforcement regimes that replace the unlikely, but high, cost arising from a crash with the far more certain, but lower, cost arising from a traffic infringement. In considering strict liability applied to crashes with cyclists, these will be unlikely events with the majority of motorists’ transgressions remaining undeterred as they will not result in a crash. The effect is rendered even more uncertain if the impact of insurance is taken into account. Third party injury coverage is universal, property damage common (mandatory in The Netherlands). So, even if drivers overcome their optimism bias to remain concerned about the risk of a crash, the economic consequences will be slight.

The second, ethical, issue goes to the heart of the Safe System. As noted by Boufous, there is a need for equitable access to compensation for damage. In a civilised society, the strong have an obligation to protect the vulnerable. However, do strict liability laws strengthen the paradigm of blaming the driver when this is one of the key challenges in implementing the Safe System that most jurisdictions still struggle with? Should liability be determined against a human driver who has made momentary mistake, or against the system designers or operators who have allowed, and continue to allow, the conflict to occur? The latter would certainly encourage significant change.

References

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Response: It is time to consider a presumed liability law that protects cyclists and other vulnerable road users

Soufiane Boufous¹

¹*School of Aviation, Transport and Road Safety (TARS) Research, University of New South Wales, Sydney, Australia*

Corresponding Author: Soufiane Boufous, School of Aviation, UNSW, Sydney, NSW Australia 2052, soufiane@unsw.edu.au. +61 2 9385 6227.

The author would like to thank James Holgate for the interest in the paper. The two points raised are relevant and important to the debate over the potential role of presumed liability laws in protecting cyclists and other vulnerable road users.

It is difficult to provide reliable evidence regarding the first issue of whether the change in strict liability laws will make a difference, particularly in terms of reduced injury to cyclists. The main reason is that presumed liability laws were often implemented in some European countries at the same time as other measures, including better infrastructure and reduced speed limits in residential areas. The package of these measures, including presumed liability laws, has been attributed to improved cycling safety in these countries. As a minimum, changes in liability laws as proposed in the paper have the potential to raise awareness about the dangers facing cyclists on the road and to highlight the fact that motor vehicles are potentially “dangerous weapons” that requires caution, particularly around vulnerable road users, including pedestrians and cyclists.

On the second ethical issue of how the proposed changes to presumed liability laws fit within the wider context of safe system, I don’t believe that the proposed changes necessarily strengthen the paradigm of blaming the driver. As mentioned, the changes will ensure equitable access to compensation for damage. In addition, while safe system approach to road safety accepts that human error is inevitable, it also recognises the need for responsible road user behaviour, which includes the responsibility of drivers as the “more powerful road users” towards vulnerable road users. At the same time, there is a need for improvements in the road transport system that makes allowances for errors by drivers and that minimises the consequences on vulnerable road users. These include what was mentioned at the end of the paper regarding the need for traffic calming with an emphasis on reduced speed limits in residential areas and better cycling infrastructure with appropriate intersection treatments.