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WHO PAYS FOR ROAD VIOLENCE? RETHINKING ROADS, CYCLING, AND TORT LAW

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by

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ABSTRACT

Road violence is now commonplace in North American cities. However, it has not always been like this. During the advent of the automobile, every road death was a source of outrage. It was concerted action from the motor industry, organized into the self-named "motordom," that managed to shift the blame of the deaths. With the new perception that cars had the right to the roads, victims of road violence would start sharing that blame with drivers in the popular opinion. This shift affected law, including tort law. Before the advent of the motor vehicle, cycling law was an area of legal studies, called the "law of wheelmen." It was put aside after the automobile, with the creation of road traffic laws clearly centred on motorized vehicles. Common law courts, facing tort claims arising from road violence, remained loyal to the negligence principle. This thesis explores alternatives to the classical car-centred understanding of tort law in Ontario. With an advocacy-oriented approach, it focuses on collisions involving bicycles and motor vehicles, with the intent of providing solutions that result in better distribution of the burden caused by automobiles on road safety. A comparative lens was used in order to find and analyze better options in other jurisdictions.

DEDICATION

À Julia.

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CHAPTER 1
INTRODUCTION

Bicycling as means of transportation is a live political discussion in Canada and throughout the world. Academics in many different areas of knowledge, such as sociology, geography, and history, have produced significant research on the topic.[1] However, not a great deal of academic legal literature and research has been produced.[2]

Proposing an agenda to fill this gap, Christopher Waters suggests the rebirth of cycling law.[3] This area of law existed before the automobile era under the name "law of wheelmen;" however, it was forgotten after the motorization of our roads and laws. Waters cites many areas that may be the focus of future legal cycling research, from infrastructure to enforcement. Cycling law, as any area of law, cannot be disconnected from other areas of social research. For that reason, Waters relies not only on legal literature from the law of wheelmen era, but also on modern academic literature on cycling, citing for example Glen Norcliffe as the leading scholar on the topic.

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[1] See for example James Lewis Longhurst, *Bike Battles: a History of Sharing the American Road* (Seattle: University of Washington, 2015); Elly Blue, *Bikenomics: How Bicycling Can Save the Economy*, 2nd ed (Portland: Microcosm, 2016); Glen Norcliffe, *The Ride to Modernity: The Bicycle in Canada, 1869-1900* (Toronto: University of Toronto press, 2001); Wiebe E Bijker, *Of Bicycles, Bakelites, and Bulbs: Toward a Theory of Sociotechnical Change* (Cambridge: MIT Press, 1995); Zachary Mooradian Furness, *One Less Car: Bicycling and the Politics of Automobility* (Philadelphia: Temple University Press, 2010); Yuriê Baptista César, *A Garantia do Direito à Cidade através do Incentivo ao Uso da Bicicleta nos Deslocamentos Urbanos* [The Guarantee of the Right to the City through the Incentive to the Use of the Bicycle in Urban Mobility] (BA in Geography Monograph, Universidade de Brasília, 2010) [unpublished, archived at Universidade de Brasília].

[2] Some of the few examples include Christopher Waters, "The Rebirth of Bicycling Law?" (2012) 91:2 Can Bar Rev 395; Gabrielle Appleby & Adam Webster, "Cycling and the Law" (2016) 39:1 UNSWLJ 129; Colleen Maker, "Strict Liability in Cycling Laws to Ready the Roads for Environmentally Friendly Commuting" (2015) 42 Boston College Envtl Aff L Rev 473; Piero Barbacovi, *Bicicleta e Direito à Cidade: Como as Políticas Públicas em Ciclomobilidade Afetam o Direito à Cidade dos Cidadãos de Fortaleza* [Bicycle and Right to the City: How the Public Policies in Cycle Mobility Affect the Right to the City of the Citizens of Fortaleza] (LLB Monograph, Universidade Federal do Ceará, 2016) [unpublished, archived at Universidade Federal do Ceará].

[3] Waters, *supra* note 2.

This thesis accepts the proposed rebirth of cycling law and intends to contribute to its comprehension, with a special focus on the protection of road violence victims through the lenses of tort law. It is an important contention of this research that understanding the assumptions that form the basis of legal decisions on cycling requires researching the historical construction of how our society perceives cars, bicycles, pedestrians, and the streets. Although this perception can affect many areas of legal decisions in many geographical locations throughout North America, a focus on liability law in Ontario was chosen in order to limit the scope of the thesis.

Before we start, it is important to note that this research focuses on a North American context in order to understand the law and policy in Ontario. It assumes that the cycling processes in American and Canadian cities are similar, as are urban dynamics in general. Some references are made to European countries, considering the interconnections that happen in the Global North, and some lessons are also taken from the Global South, especially Brazil, where the author has most experience in cycling advocacy.

Naturally, this thesis is written under a cycling advocacy perspective. It assumes that cycling contributes to face several modern urban problems, such as pollution,[4]

[4] Maker, *supra* note 2.

obesity,[5] traffic congestion,[6] and, as will be seen in this thesis, road violence. The term "accident" is not used, since it makes road violence seem unavoidable.[7]

This thesis is composed of five chapters. After this introduction, historical research will take place in the second chapter to investigate the dynamics that moulded how we currently perceive cars, bicycles, and the streets. This chapter, composed of three sections, is important to inform the second chapter, which will explore how legal decisions and statutes in Ontario deal with cycling when it comes to liability claims – and what could and should be changed. In the first section, a brief history of the advent of the bicycle will be shown, with all the urban changes that accompanied it. The focus of this section is to assess how bicycles paved the way for the automobiles. Similarly, the first section will lay the groundwork for the second section, which focuses on the advent of the automobile and on how the perception of its danger has changed with time. The third section will show the return of the bicycle as an important topic when it comes to mobility.

Turning to the third chapter, its first section will provide an overview of the historical construction of cycling law. Then the second section will investigate Canadian case law and assess how the social constructions of the bicycle, the car, and the streets found in the first chapter influences legal decisions.

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[5] Li Ming Wen & Chris Rissel, "Inverse Associations between Cycling to Work, Public Transport, and Overweight and Obesity: Findings from a Population Based Study in Australia" (2008) 46:1 Preventive Medicine 29.

[6] David Ogilvie et al, "Promoting Walking and Cycling as an Alternative to Using Cars: Systematic Review" (2004) 329:7469 BMJ 763.

[7] Julyver Modesto de Araujo, "O Acidente de Trânsito é Necessário ou Contingente?" [Is the Traffic Accident Necessary or Contingent?] (2009), online: *Conteudo Juridico* <http://www.conteudojuridico.com.br/artigo,o-acidente-de-transito-e-necessario-ou-contingente,25236.html>.

As the last chapter before the conclusion, the fourth chapter will be an attempt to fill legal gaps identified in the second chapter. For that purpose, the French and German tort and insurance systems will be analyzed. The Ontario no-fault insurance scheme will also be studied, in order to assess the possibility of broadening its scope. Lastly, the Quebec no-fault insurance scheme will be analyzed as another possible alternative.

CHAPTER 2
WHO SOCIALLY BELONGS TO THE ROAD?

The modern history of our streets is a history of defining and redefining social perceptions of the streets and the machines that are operated on them. Traffic conflicts on public roads increased dramatically with the advent of the automobile. When motor vehicles first appeared, motorists had to struggle to become accepted on the streets. Before the automobile, however, a similar struggle happened with bicycles. Cyclists were a new category of road users and it took them some time to be accepted as such. After the automobile, this struggle remains alive, but now very differently from how it was before the motorized vehicle dominated the streets.

In this chapter, the history of the advent of both the bicycle and the automobile will inform how social perception towards both machines changed through time. The bicycle, as will be seen, struggled to be accepted on two separate occasions: when it first came into existence on our roads and when it was forgotten in favour of the motorized vehicle.

The bicycle

Automobiles are now associated with freedom. However, the first product considered to be a "freedom machine" was the bicycle.[8] Its introduction to the urban roads allowed people to move easily, faster, and with larger spatial freedom combined

[8] Glen Norcliffe, *Critical Geographies of Cycling: History, Political Economy and Culture* (Farnham: Ashgate, 2015) at 2.

with the ability to decide their own individual schedules for the first time.[9] As one could expect, with this freedom of breaking existing boundaries came many cultural changes. Although the cycling struggles are currently related to the automobile culture – by far the biggest barrier to everything related to cycling – the bicycle's advent did not come so smoothly even prior to the automobile's existence.

In this section, the advent of the bicycle will be discussed. It will be shown that bicycles introduced many of the social elements that we see today in our cities, most of which were transferred to automobiles. For example, bicycles made it possible for people to live further from their workplaces.[10] It was the highwheel bicycle that encouraged males to use a moving vehicle to show their status and masculinity, which is done today with automobiles.[11] The car, of course, allowed for an exaggeration of these elements, causing severe problems as will be discussed throughout this thesis. As will be shown in this section, however, bicycles played an important role to pave the way for automobiles – both physically and culturally.

From "macho bicycles" to safety bicycles

Elements of gender were present in the bicycle culture since its advent. When it became popular, its most common type was the highwheel bicycle, characterized by a higher front tire. Due to its height and difficult maneuverability, its users would often fall

[9] *Ibid* at 148.
[10] *Ibid* at 13.
[11] Thiago Benicchio, "Sociedade do Automóvel" (2005), online (video): *YouTube* <https://www.youtube.com/watch?v=4eWvSwzkidE>.

and hurt themselves. Men liked to use it to display their courage and ability.[12] Women would generally not use it.

Two social groups can be distinguished in relation to this new artifact. The first, consisting of athletic young men, considered it a "macho bicycle".[13] The second consisted of older people and women, who considered it an unsafe vehicle.[14] The way in which bicycles were perceived was exemplified in the culture of cycling clubs at that time. A regular cycling club was exclusively male, had substantial barriers to entry, and was "very cavalier in its attitudes to risk and safety."[15] Women came to use the bicycle in large numbers when the modern safety bicycle appeared. As an indicator of the new cycling era, the Montreal Bicycle Club had its first female member in April 1888: Alice A. Simpson, who was the daughter of a club member.[16] A woman in the club, however, was not well perceived by all members. Conservative members wanted to preserve the status that the highwheel bicycle conferred on them. Nonetheless, more and more people were attracted to safety bicycles, making those conservative members seem anachronistic[17] – especially after 1892, when more comfortable pneumatic tires became widespread. By that time, one-third of all cyclists in North America were female.[18]

Cycling clubs originating in the era of the highwheel bicycle formed a new mode of technological citizenship, characterized by male predominance and social elements deemed as male highlighted by its use, including the courage to face danger. Decades

[12] Norcliffe, *supra* note 8 at 35.
[13] *Ibid*.
[14] Bijker, *supra* note 1 at 40.
[15] Norcliffe, *supra* note 8 at 138.
[16] *Ibid* at 137.
[17] *Ibid*.
[18] *Ibid* at 158.

later, these characteristics would be transferred to the automobile,[19] used by males to demonstrate their manhood thought risky behaviour.

From the elite to the masses

Bicycles were not popular in the beginning, in the sense that they were not used by the masses. Until the late 1890s, they were not affordable to regular workers due to their high price.[20] At that time, the bicycle was one of the most visible indicators of status and of technological progress,[21] being used by the richest to show off their wealth.

Again, cycling clubs were an example of the bicycle's role to show status. High standards of entry made it impossible for people outside the elite to join the clubs. In the Montreal Cycling Club, considering a new potential member depended on their referral by one current member and second by another. A membership committee voted anonymously, and a single vote against the potential new member would prohibit their entry.[22]

The "gentlemen" characteristics of the club members were transferred to their behaviour in cycling on the roads. Club members were expected to behave safely and respectfully, especially towards women. In Britain, for example, the Cycle Touring Union prohibited cycle racing on public roads, believing that those races damaged the image of road cycling.[23]

[19] *Ibid* at 138.
[20] *Ibid* at 4; Longhurst, *supra* note 1 at 24.
[21] Norcliffe, *supra* note 8 at 217.
[22] *Ibid* at 141.
[23] *Ibid* at 5.

Cycling club members, however, were not the only bicycle users on the roads. Beside the club members who cycled in an orderly fashion on them, streets also had cyclists who would show their status by riding fast and recklessly, which was considered a masculine performance referred to as "scorching."[24] As a result of the connection between scorching and maleness, the attitude was far more condemned when the rider was a woman.[25]

When its cost was reduced, the bicycle became commonplace. It then lost its general function of determining the owner's status and started to be used for the convenience it provided.[26] Years later, cars would allow the richest to display and perform their status on the streets again. Curiously, the same process that happened with bicycles also happened with cars, which began as an object that showed status and later became a popular vehicle. Today, the use of cars to assert status is still present, and in some cycling groups expensive bicycles are also still being used in this way.

Suburbanization

The bicycle pushed many behavioural and spatial changes on cities. One of these changes was their physical size. With bicycles, citizens could now work, study, and live further away. Along with streetcars and railways, bicycles were partially responsible for the suburbanization of the population.[27] Following the bicycle, cars also strengthened the process of suburbanization, resulting in spread-out cities suffering from all the consequences of low density and mass car ownership that are seen today.

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[24] *Ibid* at 159.
[25] Ellen Gruber Garvey, "Reframing the Bicycle: Advertising-Supported Magazines and Scorching Women" (1995) 47:1 American Quarterly 66 at 75.
[26] Norcliffe, *supra* note 8 at 12.
[27] *Ibid* at 13.

The cult of speed

Before the advent of the bicycle, roads were mainly dominated by horses and horse drawn carriages. People on bicycles shared the road with them, with constant conflicts. The users of these established modes of transportation did not enjoy having to share their space with the newcomer bicycle.[28]

Criticism of bicycles came from many directions. Editors and even evangelists would angrily argue against them.[29] The growing number of cyclists moving around without respect for pedestrians would help shape the image of the vehicle as something that caused disorder.[30] With bicycles came the cult of speed,[31] causing a speed limit of eight miles per hour on city roads to be proposed in Winnipeg.[32] Some locations got to the point of totally banning bicycles from the roads, such as the city of San Francisco and the entire state of Kentucky in the 1880s.[33] Bicycles were forbidden in many parks, as in Brooklyn's Prospect Park, Philadelphia's Fairmont Park, and Chicago's Lincoln Park.[34] Critics of the cult of speed claimed that riding at high speed into the wind would cause a permanent disfigurement called "bicycle face."[35]

Due to the increasing number of cyclists, bicycles survived both the several prohibitions and the regular struggles with horse-drawn vehicles that took place in the 1870s and 1880s. Their legal legitimacy on the roads came with the leading common-law

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[28] *Ibid* at 146.
[29] *Ibid* at 163.
[30] *Ibid*.
[31] *Ibid*.
[32] Waters, *supra* note 2.
[33] Longhurst, *supra* note 1 at 32.
[34] *Ibid*.
[35] Carl Honore, *In Praise of Slow: How a Worldwide Movement Is Challenging the Cult of Speed* (Toronto: Knopf Canada, 2004) at 46.

decision in *Taylor v Goodwin*, in which bicycles were declared to be carriages and were therefore allowed on the roads and forbidden on the sidewalks.[36] As will be seen in the following chapter, cars also struggled to become accepted on the roads and eventually won, although through a very different process.

The cycling industry

Another way through which the cycling culture was continued in the automobile culture was the development of the industry of mass production. Many bicycle manufacturers became, at a later stage, producers of automobiles.[37]

An example of this movement can be seen in the Pope Manufacturing Company. Through manufacturing bicycles, Albert Augustus Pope developed methods of testing and quality control considered to be essential for the automobile industry.[38] Henry Ford, who later became a mass producer of cars and an icon of mass production due to the methods he created, visited Pope's industries many times and even worked as a bicycle mechanic for a competitor of Pope's company, learning substantially about bicycle production before producing automobiles.[39] It is argued that Pope's fabrication and assembly facility served as the prototype of the Fordist plant.[40]

Pope not only developed the mass production of bicycles, he also acted politically to benefit his products. He advocated for cycling on city roads and in city parks, such as

[36] *Taylor v Goodwin*, [1879] 4 QBD 228.
[37] Norcliffe, *supra* note 8 at 2.
[38] David Hounshell, *From the American System to Mass Production, 1800-1932: The Development of Manufacturing Technology in the United States* (Baltimore: Johns Hopkins University Press) at 207.
[39] Norcliffe, *supra* note 8 at 86.
[40] *Ibid* at 87.

in New York's Central Park, where cycling was prohibited in 1880.[41] In 1881, a cyclist deliberately rode in the park to judicially challenge the prohibition. Pope spent thousands of dollars in litigation for this case. Cycling in Central Park would only be allowed in 1887 by an act of the New York State. Years later, the automobile industry would advocate for driving cars on roads. Differently from Pope's effort, however, the industry would act concertedly, lobbying as a block to politically and socially promote its product.

The cycling industry was extremely important to the development of the automobile industry. Even though the automobile obfuscated the bicycle, resulting in the latter's decline, many companies embarked in the new era, stopping the production of bicycles in favour of producing cars.

The good roads movement

Cycling advocacy had great achievements at the early stage of urban cycling. Beside the political actions of Pope, there were also cyclists' associations advocating for better conditions for cycling. Although cycle paths were an option, as installed in Winnipeg,[42] cyclists would mainly ride on the road and advocate for road improvements.

Cyclists were ahead of the good roads movement, and their pressure for better roads resulted in the first smooth roads in the Americas.[43] What they didn't expect was that the good roads, the industrial practices developed in the bicycling factories, and the cult of speed would pave the way for the dominance of a machine that took over the bicycle's image as a symbol of modernity. With an industry that holds much more

[41] *Ibid* at 79–80.
[42] Waters, *supra* note 2.
[43] *Ibid*.

economic and political power, the automobile would overshadow the bicycle for many decades.

The automobile

There are 1.25 million road deaths annually in the world,[44] 2,114 of them in Canada.[45] Cars have caused violence and deaths on the road since their advent. Cycling advocates usually wonder how it is possible that drivers do not perceive the danger of driving. How can someone, driving a machine that may quickly kill a human being, not focus all their attention on this activity? How can some find it inoffensive to peek at the cell phone while driving? In this chapter, changes in the social perception of the car will be studied, showing how, in the beginning of the automobile era, its danger was clear in the eyes of everyone.

The car has become part of many cultures all over the world, mainly in North America. It is a regular tool for Canadians to get to work or school. People have become so used to it that the activity is automatic and rarely thought about anymore. However, this does not seem to fully explain the process by which Canadians lost the perception that the automobile is dangerous. The naturalization of the danger of the automobile was a historic process. To understand it, one must acknowledge what has happened since the

[44] World Health Organization, *Global Status Report on Road Safety 2015: supporting a decade of action* (Geneva: WHO, 2015) at 2.
[45] *Ibid* at 106.

automobiles first appeared on the streets. The main change in the social perception of danger on the streets happened between the 1900s and the 1930s.[46]

Social groups fight for their interpretation of the streets

James Lewis Longhurst claims that the cultural background that results in specific types of policies are either described as *values* or as *frames*.[47] Different from values – derived from philosophies of diverse groups – frames are based on rhetoric and assumptions that shape people's perceptions. For Longhurst, policy and perception influence each other.[48]

Frames are an important concept for Peter Norton. The historian explains the construction of street policies through the idea that different social groups had different frames shaping their perception of the streets. Norton claims that streets were "socially reconstructed as places where motorists unquestionably belonged." [49] That social reconstruction explains the physical reconstruction of the streets, redesigned for cars. Norton argues that between 1915 and 1930, a "violent revolution" took place, changing the perception of cars – previously seen as an intruder.[50]

Apart from the struggles that the bicycle faced to be accepted in the streets, the social constructions of the streets were mostly stable before the advent of the automobile. Although the advent of the bicycle resulted complaints about its use on the roads, it did not change the general perception of how roads were used. However, the invention of the

[46] Peter D Norton, *Fighting Traffic: The Dawn of the Motor Age in the American City*, 1st ed, Inside technology (Cambridge: MIT Press, 2011).
[47] Longhurst, *supra* note 1 at 12.
[48] *Ibid* at 13.
[49] Norton, *supra* note 46 at 1.
[50] *Ibid* at 2.

automobile created a series of conflicts on how the streets were and should be understood. Norton identifies social groups that claimed different perceptions of the streets: pedestrians, safety reformers, police, street railways, Downtown Business Associations – called Business Improvement Associations (BIA) in Canada, traffic engineers, and the automobile industry.[51] Pedestrians, parents, police, and downtown business associations tried to preserve the streets as they were perceived before: a common place for people to walk and meet. Drivers and the automobile industry, on the other hand, wished for streets with no obstructions for cars. The new conflicts caused by the automobile made these social groups more cohesive,[52] as people either identified themselves as pedestrians or drivers.

In the context of the streets, Norton defines as *technological frame* the approach to traffic problems shared by a relevant social group.[53] The technological frame of "angry pedestrians" and parents worried about children's safety was *justice*.[54] The police's technological frame was *order*. Street railways, chambers of commerce, engineers hired by them, and, before the mid 1920s, the automobile industry fought congestion and had a technological frame called *efficiency*.[55] The automobile industry, however, soon decided that it would be better for their business to have a positive perception of the automobile. They found it in the idea of *freedom*, which became their own technological frame.[56]

The processes through which each of these different accounts of the automobile have vanished, resulting in only one surviving interpretation, are called closure and

[51] *Ibid* at 3.
[52] *Ibid*.
[53] *Ibid* at 4.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.

stabilization.[57] Closure happens when interpretation flexibility declines, followed by stabilization, which is the prevalence of one interpretation.[58] In 1930, people not following the rules as they crossed the street would agree that they were jaywalking. In 1920, however, most would disagree with the term.[59] In other words, even if people in 1930 disagreed that jaywalking was wrong, they would do so under the definition of jaywalking that was already stabilized.

It is important to note that after closure problems might continue and even get worse, but the solutions for them are often stuck within the given interpretation.[60] This helps explain the current legislation against jaywalking and the continuing attempt to reduce road deaths by controlling the behaviour of pedestrians and cyclists.

Norton identifies three closure mechanisms. The first, rhetorical closure, happens when "promotional language is used to assert the success of the new way, much as advertising promotes a product."[61] Through the mechanism of rhetorical closure, the automobile industry managed to claim the success of the car, despite all the congestion and road deaths.

The second closure mechanism is the redefinition of the problem. During the first years of the advent of the automobile, nuisances caused by it were considered unfair. The problem was defined as *"what is just?"*[62] Traffic engineers, working for downtown

[57] *Ibid* at 5.
[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*.
[62] *Ibid* at 6.

business associations, defined the problem as "*what is efficient?"*[63] As the matters of fairness and efficiency counted negatively for the automobile industry, a new definition of the problem was found by the mid 1920s: *"what is freedom?"*[64] Considering driving a matter of freedom, the problems of fairness and efficiency could be overlooked.

Norton calls the third mechanism "closure by control of use and misuse"[65], which refers to the understanding of what the streets are for. Before the 1920s, automobiles were considered a misuse of the streets[66]. In the middle of the 1920s, the automobile industry worked on the notion that cars belonged in the streets. With this notion, road deaths and congestion were to be fought by means that did not affect the existence of the automobile on the roads.

Currently, the interpretation of the automobile has stabilized: cars are seen as a symbol of success; every attempt to supress their use is deemed to supress driver's freedom; and there is a general understanding that cars belong to the roads.

Blame

Leandro Karnal, a Brazilian philosopher, once said that the cell phone is a value in Western society, since people die for them.[67] In his explanation of this statement, he gave the example of people dying as they drive and check their cell phones. People risk their lives, he says, for the cell phone. It is interesting in this thought how car driving is taken for granted, while using the cell phone is not. If a person is driving a car and,

[63] *Ibid*.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid* at 7.
[67] Roda Viva, "*Roda Viva | Leandro Karnal | 04/07/2016"* (2016), online (video): <https://www.youtube.com/watch?v=JmMDX42jOoE>.

distracted, hits a wall, the damage will be extremely different from if the same person were walking and hit the same wall. The factor of danger for Karnal, however, is the cell phone, because the car is too integrated in our modern daily commute to even be noted.

In fact, nowadays, when somebody is hit by a car, many elements may be considered as the cause. Was the driver drunk? Were the road conditions appropriate? Was the pedestrian jaywalking? These are questions that might arise, and they show that the blame for a person's death may be put on either the motorist, the municipality or the pedestrian themselves. Naturally, many other actors might be blamed depending on the circumstances.

Although posing these questions might seem obvious now, before the mid-1920s, the blame for road deaths was immediately put on cars and motorists.[68] It was common for the driver to suffer "mob attacks" when they hit a pedestrian, especially if the pedestrian was a child.[69] In popular perception, cars were considered inherently dangerous. Motorists, intrinsically related to their cars, were dangerous as well.[70] No distinction would be made between responsible and irresponsible drivers.[71] Newspapers would depict automobiles as "juggernauts", publishing cartoons in which cars were monsters that kill children.[72]

The safety publicity of the early 1920s showed the victims of automobiles as children and young females.[73] The motorists were personified either in the image of death

[68] Norton, *supra* note 46 at 25.
[69] Blue, *supra* note 1 at 111.
[70] Norton, *supra* note 46 at 27.
[71] *Ibid*.
[72] *Ibid* at 28.
[73] *Ibid* at 29.

or a reckless male driver.[74] For Norton, the popular and official attacks on motorists were based on the perception that driving was not a necessity;[75] therefore, the deaths caused by driving were all intolerable. As it was widely understood during the advent of the automobile, the element that made cars so dangerous was speed.[76] As an example, Norton says that, in 1920, "[a]s the Milwaukee chamber was organizing a local safety council, it bought a full-page newspaper advertisement blaming accidents simply on a 'never-ending call for speed.'"[77]

Only more than a decade later would the blame on speed be questioned. In the mid-1920s, some newspaper commentaries would blame careless driving, claiming that speed was not the dangerous factor.[78] This shows the process by which people got used to cars and their speed in the streets. Since they now belonged to the streets and people were used to their speed, cars were not to blame anymore for all the road deaths that only rose exponentially after the advent of the automobile.

The rebirth of the bicycle

Around the 1970s, the dominance of the automobile started to be challenged. Traffic jam, road deaths, pollution, and oil wars were some of the reasons for the appearance of social movements that rejected the gas-powered vehicles. Since then, many associations and informal movements have surged with the intent to change the way people move in cities. Walking and taking public transit are some of the solutions to

[74] *Ibid*.
[75] *Ibid* at 30.
[76] *Ibid* at 31.
[77] *Ibid* at 37.
[78] *Ibid* at 31.

reduce car-dependency, but the rediscovery of the bicycle as means of transportation has been leading a new way of perceiving the streets.

Kindling the discussion on bicycle mobility is an event called Critical Mass. Happening in 300 cities all over the world, its riders cycle around cities, bringing visibility to active modes of transportation. [79] Repudiating hierarchical ways of organization, the rides tend to be spontaneous, without a central command. As a result, the way the Critical Mass riders act changes from place to place and from time to time. A central characteristic of Critical Mass is that it is a place of discussion, bringing to more people the debate regarding modes of transportation. Starting its rides in 1992 in San Francisco,[80] Critical Mass has had several problems, such as the tendency to reinforce sexism through male exhibition of aggressiveness [81] and the lack of low-income participants,[82] who are generally the ones who suffer the most from the automobile-centred city.[83] However, it is also true that many current cycling mobilizations are a result of Critical Mass' encounters, which puts the event in a special place when it comes to the return of the bicycle in public discussions.

Along with the informal Critical Masses, cycling associations were formed in order to advocate for cycling safety and infrastructure, and are also active in many cities throughout the world. In Ontario, Cycle Toronto and Bike Windsor Essex are examples

[79] Alexandra Flynn, "Regulating Critical Mass: Performativity and City Streets" (2016) 37 Windsor Rev Legal Soc Issues 105 at 98.
[80] Furness, *supra* note 1.
[81] Mario Bruzzone, "Putting the 'Critical' in Critical Mass" in Chris Carlsson, LisaRuth Elliott & Adriana Camarena, eds, *Shift Happens!* (San Francisco: Full Enjoyment Books, 2012) 131 at 131.
[82] Adriana Camarena, "The Blind Spot" in Chris Carlsson, LisaRuth Elliott & Adriana Camarena, eds, *Shift Happens!* (San Francisco: Full Enjoyment Books, 2012) 117 at 117.
[83] Blue, *supra* note 1 at 42.

of these entities. The associations have a political role of convincing governments and legislatures to pass initiatives that promote urban cycling.

Less related to advocacy, informal cycling groups were also formed to use the bicycle as an instrument of leisure. These groups gather to ride around the city, usually at night. These events also happen all over the world and are extremely diverse in how their riders act politically. While some are also cycling advocates, others understand cycling solely as a leisure activity, using their cars to commute. Although their many effects on urban cycling are objects of controversy, it is undeniable that their huge number of riders gives the bicycle visibility in the streets.

The sum of cycling advocacy and activism, added to the rediscovery of its use as a form of leisure, has pressed the public debate regarding how people move around cities. After decades of work, cycling advocates are being able to show the inefficiencies of automobility, but not without a strong backlash.

One of the clearest illustrations of the backlash was former Toronto mayor Rob Ford's statement on cyclists' deaths. Ford said that the deaths are the cyclists' fault, since the roads are made for cars.[84] As shown in this chapter, roads existed before automobiles. Their quality improved greatly with the good roads movements, of which cyclists were an important part, also before the advent of automobiles. Perhaps Ford's statement was one more populist act in his strategy to be noticed though polemicizing – Ford was not yet mayor at the time of the speech. However, his ideas resonated in the minds of many people as a result of the huge campaign from the automobile industry

[84] Jason Margolis, "Cyclists Accuse Toronto Mayor of Waging 'War on Bikes'" (3 May 2012), online: *BBC News* <http://www.bbc.com/news/magazine-17914504>.

towards understanding cars as belonging in the streets. More radically, it could be said that there is an understanding that the streets belong to cars and their owners. The belief that paying taxes related to car ownership and purchase of oil gives one the right to the road is part of that way of thinking.

Cycling advocates are confronting the backlash by collecting data and relying on academics and professionals from several fields. In some cases, however, that doesn't seem to be enough. Blue shares an instance when she was presenting the benefits of cycling and a city planner confronted her: the city planner only seemed convinced when Blue said that a rival city (in football) was investing in becoming cycling-friendly.[85] Decades of automobility-centrism has made it difficult for professionals to change their way of doing things.

For Norcliffe, three factors are responsible for the low use of bicycles: high-pressure lifestyles that limit people's time to use them; the comfort of driving, which requires less effort than cycling; and the fear of cycling.[86] The first and third factors are more anecdotal than factual. In many large cities, which usually face heavy traffic congestion, commuting by bicycle may be faster than commuting by car. In many capitals of Brazilian states, Intermodal Challenge is an annual experiment in which people go from one place to another using different means of transportation – the context tries to get as close as possible to a commuting experience during regular hours of work. The person on a bicycle always arrives faster than the one on a car.

[85] Blue, *supra* note 1 at 9.
[86] Norcliffe, *supra* note 8 at 232.

The fear of cycling may be factual in the sense that people do fear cycling, however the fear does not correspond to the actual danger. First, the perception of danger is exaggerated due to a lack of experience cycling on the streets – it appears less dangerous the more experience one has, not only because of the acquired ability in cycling but also because cyclists get used to having cars around them. The less a person cycles, the more they tend to think it is dangerous. Second, the perception of danger for cycling is obfuscated by the normalization of the danger of driving, as discussed in this chapter in the previous section of blame. Driving is exponentially more dangerous than cycling – the number of deaths did not rise with the advent of the bicycle the way they did with the advent of automobiles. Claiming that cycling is dangerous may reinforce that driving is not, or that the danger of the cycling-driving relation remains due to the cycling factor.

In fact, data on cycling deaths tend to hide the danger of the automobile. The *Canadian Motor Vehicle Traffic Collision Statistics 2016* shows that 906 drivers, 358 passengers, 334 pedestrians, and 42 bicyclists died in 2016.[87] What the statistics do not show is how many pedestrians and cyclists died in a collision with a motorized vehicle. Hiding that most, if not all, pedestrians and cyclists' deaths had an automobile as part of the event masks that the automobile is involved in virtually all road deaths. The number as is presented – 334 pedestrians, 42 bicyclists – make it seem dangerous to walk or cycle.

[87] "Canadian Motor Vehicle Traffic Collision Statistics: 2016", (5 December 2017), online: *Transport Canada* <https://www.tc.gc.ca/eng/motorvehiclesafety/canadian-motor-vehicle-traffic-collision-statistics-2016.html>.

In the case of Ontario, the *Preliminary 2016 Ontario Road Safety Annual Report Selected Statistics* shows that 226 drivers, 82 passengers, 96 pedestrians, and 15 bicyclists died in 2016.[88] In a separated table, the report shows that, from the total of 439 fatal collisions, passenger cars were involved in 433 of them, passenger vans in 31, pickup trucks in 102, delivery vans in 10, large trucks in 93, among other vehicles. Bicycles are cited in the broad category of "other", therefore there is no number available specifically related to them. This last table seems to better depict how motorized vehicles are present in virtually all road deaths – hitting either each other or pedestrians and cyclists.

Concerned about the death of cyclists, the Chief Coroner of Ontario published the Cycling Death Review in 2012 with recommendations for changes in the areas of infrastructure, education, legislation, and enforcement.[89] Although comprehensive and correctly under the presumption that all cycling fatalities are preventable,[90] the review unintentionally starts from the socially constructed perception that cars, speed, and danger belong to the roads. It refers, for example, to cyclists as being eight times more likely to suffer fatal injury,[91] however does not mention which vehicle is more likely to cause someone's death. An important contribution of the report is the data that considers the different types of cycling activity: it shows that 63% of the cycling fatalities happened during recreational cycling, while only 31% happened during commuting and 6% during

[88] Road Safety Research Office, "Preliminary 2016 Ontario Road Safety Annual Report Selected Statistics" (2016) at 4, online (PDF): *Ministry of Transportation* <http://www.mto.gov.on.ca/english/publications/pdfs/preliminary-2016-orsar-selected-statistics.pdf>.
[89] Office of the Chief Coroner for Ontario, "Cycling Death Review" (2012), online (PDF): *Ministry of Community Safety & Correctional Services* <https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/ec159773.pdf>.
[90] *Ibid* at 2.
[91] *Ibid*.

sport cycling.[92] The report does not mention the percentage of daily cycling that is destined to each of these activities, however these numbers show that cycling commuting deaths may be much lower than what we usually see in statistics.

Although cycling is only a part of the solution that must include public transit, walking and many changes in city planning, cyclists are on the front line when it comes to advocacy for urban reform. Their push has forced governments and legislatures to rethink many aspects of how cycling is addressed. This thesis is a result of and an attempted contribution to this push in the field of how cycling is perceived in law, as will be discussed in the next chapter.

[92] *Ibid* at 15.

CHAPTER 3
WHO LEGALLY BELONGS TO THE ROAD?

Although road deaths only became an epidemic after the advent of the automobile, conflicts between road users had previously been experienced between people using different modes of transportation. Many of these conflicts ended up in courts, which were forced to adjudicate on matters regarding each person's rights according to the mode of transportation they were using. Relatedly, legislatures have passed laws affecting cycling, mostly motivated by the polemics that derive from these conflicts.

This chapter will argue that legal regulation – through both court adjudication and legislation – regarding cycling should consider the danger of the automobile. After providing a brief history of cycling law, it will focus specifically on whether there should be a strict liability rule for drivers when it comes to collisions involving cyclists.

Cycling law

Although several sources can be found on the old law of wheelmen, few legal scholars have engaged in a discussion on cycling law in current times. This thesis engages in the discussion proposed by Waters, who suggests the rebirth of cycling law as a retrieval of the law of wheelmen.[93] The author tells the history of this field of law, explaining that the bicycle is being promoted once again, which required a renewed legal

[93] Waters, *supra* note 2 at 396.

attention to it, and sketches an agenda for the cycling legal field highlighting areas that may be addressed.

Craig Forcese and Nicole LaViolette covered a broad range of legal topics in the book *Every Cyclist's Guide to Canadian Law*.[94] Aiming to inform cyclists of the law rather than discuss the topics academically, the publication is considered "the first comprehensive look at cycling law in Canada" following the advent of the automobile.[95] It covers different areas of law that affect cycling, from tort law to criminal and traffic law.

In Australia, Gabrielle Appleby and Adam Webster also discuss the law regarding cycling in the article *Cycling and the Law*.[96] Their piece shows the social pressure that law faces regarding cycling, both from the cycling community who are pushing to make cycling safer and from car-centrists who consider cycling a nuisance.

In the United States, Ross Petty addresses cycling as a sport activity under safety law.[97] Petty claims that cycling is a specially regulated sport – compared to swimming, for example – due to its use as a vehicle as well. The author proposes a framework for safety law regarding cycling, making two divisions. First, he divides the law into the topics of *environment*, *user*, and *product*. The second division is in the legal measures of *regulation* (*ex ante)* and *litigation* (*ex post*). When it comes to the *environment*

[94] Craig Forcese & Nicole LaViolette, *Every Cyclist's Guide to Canadian Law* (Ottawa: Irwin Law, 2014).
[95] Christopher Waters, Book Review of *Every Cyclist's Guide to Canadian Law* by Craig Forcese & Nicole LaViolette (2015) 36 Windsor Rev Legal Soc Issues 204 at 204.
[96] Appleby & Webster, *supra* note 2.
[97] Ross D Petty, "The Impact of the Sport of Bicycle Riding on Safety Law" (1998) 35:2 Am Bus LJ 185.

concerning the bicycle, for example, *regulation* covers road design, traffic signs, signals, and anti-obstruction laws, while *litigation* is a result of negligent design or maintenance.[98]

An important difference between the legal work described above and the law of wheelmen is that the former appears in the context of motorized roads. This means that legal opinions are influenced by the social, car-centric assumptions that surround their authors. Therefore, every legal decision regarding cycling should consider the existence of these assumptions in order to be properly informed.

The historical construction of the law of wheelmen

There is a current understanding that people belong to sidewalks and vehicles belong to the roads. This division was not always so clear. Historically, roads were public spaces for people and vehicles. This assumption was "common sense" before the advent of the automobile and was also established under the law. In *Truman v Walgham* (1766), the King's Bench decided that a person's right to pass along a highway was "before all prescriptions."[99]

The advent of the velocipede marked the beginning of the conflict regarding who legally belongs to the road and to the sidewalk. In 1869, a note in the American legal journal *Bench and Bar* explained that a court decision was made that a toll collector could not collect tolls from people on velocipedes.[100] In Canada, the Upper Canada Court of the Queen's Bench decided that bicycles did not belong on the sidewalk for the

[98] *Ibid* at 191.
[99] 2 Wils KB 296, 95 ER 820 KB at 822.
[100] "Velocipedes and Turnpikes" (1869) 1 B Bar 92 at 92.

specific purpose of interpreting a City of London by-law regarding sidewalk obstruction.[101] The ruling, however, does not mention that bicycles belong to the road.

Belonging to the road at that time, however, did not imply being a vehicle. It was generally understood that roads were public spaces for different modes of transportation, which included walking. As a legal scholar pointed out in 1895, the term *road* "is used to express any surface over which men travel from one place to another, whether on foot, on horseback, in carriages or in other vehicles."[102]

The leading case determining that bicycles are carriages is the English decision of *Taylor v Goodwin*.[103] The court decided that riding a bicycle means propelling it and guiding it, as much as "an engine driver guides and drives a train."[104] A bicyclist was then convicted on the grounds of "furious driving" as determined in the Highway Act. The decision mentioned that the bicycle did not exist at the time the Act was passed.[105] This shows that, since the beginning, the legislation that applied to bicycles has not been made for the bicycle – it took a common law decision to fit bicycle into the legislation under the provision made for other vehicles. It is also interesting to note that it was a decision against a cyclist that created the legal definition of cyclists belonging to the road.

Several other cases helped shape the role of bicycles on the roads. In the United States, the Indiana Supreme Court confirmed in *Holland v Bartch* that bicycles are

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[101] *R v Plummer*, 1870 CarswellOnt 216.
[102] George Burr Clementson, *The Road Rights and Liabilities of Wheelmen: With Table of Contents and List of Cases* (Callaghan & Company, 1895) at 9.
[103] *Taylor v Goodwin*, *supra* note 36.
[104] *Ibid*.
[105] *Ibid*.

vehicles and have the same rights as horse-drawn carriages on the road.[106] The same court decided in *Mercer v Corbin* that bicycles were forbidden on sidewalks because they are vehicles.[107]

The right to the road was taken to a higher degree by the Supreme Court of Kansas in *Swift v Topeka (City of).*[108] In this decision, the Court established that interpreting the ordinance to exclude bicycles from the roadway section of the bridge would make the ordinance void. From the highest court of Kansas, people were given the right to choose their mode of transportation on the roads ("mode of conveyance he desires").[109] It was not thought that a mode of transportation could be invented in the future as to create too much nuisance on the roads.

Contrary to the Supreme Court of Kansas' decision was the Maryland Supreme Court in *Twilley v Perkins* in 1893.[110] In this case, the Court decided that the Legislature has the power to restrict and forbid the use of particular vehicles due to the danger it might cause to road users, therefore ruling that a statute can restrict the use of bicycles. The decision does not forbid dangerous vehicles, but it permits legislatures to forbid them. The characterization of the bicycle as dangerous is interesting, considering that the number of road deaths was minimal compared to the number of road deaths after the advent of the cars.

In Canada, case law regarding bicycles is not so rich as in the United States. However, bicycles were a live topic of political and legal discussion. In Winnipeg,

[106] 22 NE 83 (Ind Sup Ct 1889).
[107] 20 NE 132 (Ind Sup Ct 1889).
[108] 43 Kan 671 (Kan Sup Ct 1890).
[109] *Ibid*.
[110] 77 Md 252 (Md Ct App 1893).

citizens, annoyed with the behaviour of cyclists on the road, met with the civic board of works to propose a by-law prohibiting bicycle riding on sidewalks and limiting cycling on roads to the maximum speed of eight miles per hour.[111] Incoherently, the same text proposed limiting cycling on sidewalks to the maximum speed of six miles per hour. The mayor considered the limits too small, but the proposed by-law was sent to council. As a response, a set of dedicated cycle paths were constructed.[112] Years later, Manitoba would pass a bill creating the first Cycle Path Board in Winnipeg, and the first to ever exist in North America, in order to build a network of bicycle paths.[113]

This brief history of the law of wheelmen shows that the inclusion of bicycles in legal matters regarding the roads happened after a series of social and legal struggles. Statutes that regulate the use of vehicles were not made for the bicycle – it had to be included as a vehicle in common law. Since the law of wheelmen, bicycles have lacked proper regulations that take into consideration the bicycle's particular characteristics.

The law regarding cycling must be analyzed in light of its historical construction. Since most laws were originally made for horse-drawn carriages and cars, they might be partially or totally unfit to regulate cycling. Moreover, laws made specifically to regulate cycling – such as helmet laws – may be explained by the social construction of the idea that cycling is dangerous, caused by the normalization of the danger inherent in driving. As part of an effort to address one of the many areas of law that may and must be

[111] "A Bicycle By-Law" (21 May 1986), online: *Newspaper Archive* <https://newspaperarchive.com/winnipeg-free-press-may-21-1896-p-4/>.
[112] Waters, *supra* note 2 at 399.
[113] *Winnipeg Bicycle Paths Act*, SM 1901, c 53.

analyzed under the perspective of cycling law, the next section will focus on tort laws regarding collisions involving motorized vehicles and bicycles.

Tort law

The simple act of cycling is regulated by many areas of law. Traffic law, the most obvious of them, regulates what cyclists may and must do on the road. Another area of law broadly discussed regarding cycling is criminal law. Angered by the low punishment applied to drivers who kill cyclists and pedestrians, advocates have long called for a Protecting Vulnerable Road Users Act in Ontario,[114] which, among other road safety initiatives, would increase punishment for road killings.[115] Adding to criminal law, tort law also comes up after a road death or injury. Some road safety advocates do not consider it efficient to affect drivers' behaviour, since it usually affects the driver's insurance company rather than the driver themselves.[116] It is true that tort law does not come up in most recommendations regarding road safety. The World Health Organization cites important law-related factors for road safety including reducing speed, increasing motorcycle helmet use, reducing drink-driving, increasing seat-belt use, increasing child restraint use, reducing drug-driving, and reducing distracted driving, with no mention of tort law.[117] Not surprisingly, the Insurance Bureau of Canada also omits tort law from the factors that have affected the number of road deaths in Canada.[118] Although it is not the

[114] David Rider & Samantha Beattie, "'It's Time to Declare a State of Emergency': Anger, Calls for Change Follow Deaths on Toronto Streets", (13 June 2018), online: *The Star* <https://www.thestar.com/news/gta/2018/06/13/its-time-to-declare-a-state-of-emergency-anger-calls-for-change-grow-amid-deaths-on-toronto-streets.html>.
[115] *Ibid*.
[116] Albert Koehl, "Protecting Vulnerable Road Users Protects All of Us", (14 April 2016), online: *Dandyhorse Magazine* <http://dandyhorsemagazine.com/blog/2016/04/14/protecting-vulnerable-road-users-protects-all-of-us/>.
[117] World Health Organization, *supra* note 44 at 17–44.
[118] Allen M Linden, Lewis N Klar & Bruce Feldthusen, *Canadian Tort Law*, 14th ed (LexisNexis, 2014) at 891.

intention of this thesis to challenge criminal law's role in the topic, it is important to consider that the many pledges for harsher criminal punishments for drivers should be analyzed through the lens of the growing anti-prison literature.[119]

Despite its alleged inefficiency to reduce road deaths, tort law is the area of law responsible for compensating the victims of road violence. This compensation, moreover, is paid by the road user that causes road violence: the driver. It may be that the specific driver that causes a specific death will not pay for that death if they are held liable, since it is the insurance company that does so. However, the insurance premium is paid by drivers in general. Since driving is the activity that raised road deaths to war numbers, tort law, accompanied by insurance law, is the area of law that tends to allocate the costs of road deaths to the road users that cause them. Furthermore, a closer look into automotive tort law is important because collisions with motorized vehicles correspond to one third of all unintentional injuries in Canada.[120]

Insurance law plays its role by guaranteeing the existence of funds to compensate the victim and by distributing the costs to all drivers. Although it is seen as a measure to protect the driver from possible liabilities, it ends up including road violence as one of the costs of driving. Considering that cyclists and pedestrians – road users unrelated to motorized vehicles – comprise 19% of road deaths in Canada,[121] it is important to transfer these costs to those who create risks on the roads.

In Canada, traffic legislation differs from province to province. Since different rules of behaviour change the standard of care expected from road users, court decisions

[119] See Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories, 2011).
[120] Linden, Klar & Feldthusen, *supra* note 118 at 882.
[121] World Health Organization, *supra* note 44 at 106.

on tort also differ. The legislation differs on matters of what is allowed and what is prohibited on the road, but it also differs on court procedure matters. The most important procedure rule that affects cycling is the reverse onus of proof. In Ontario, for example, the *Highway Traffic Act* (HTA) states that the driver of a motor vehicle is responsible for proving they were not negligent in a collision.[122] This means that, when a driver is sued by a pedestrian or a cyclist who was hit by them, the driver's negligence is *a priori* presumed, which shifts from the plaintiff the burden to provide evidence of that.

This section will show how cases involving collisions between bicycles and motor vehicles have been decided in Canada. Although tort law regarding bicycles is a broader topic – it also involves collisions between two bicycles and state liability due to a failure to provide good conditions for the road, for example – the scope of this thesis is limited to collisions between bicycles and cars.

Reverse onus of proof

The Ontario HTA and the Alberta Highway Safety Act establish a reverse onus of proof of negligence in cases of collisions involving motor vehicles.[123] It is presumed that the driver of the motor vehicle was negligent, so the plaintiff does not have to prove this element. While this does not apply in collisions involving two motorized vehicles, this procedural rule has been essential in cases involving cyclists. It is, indeed, difficult to provide the negligence of the driver, since it is difficult to gather evidence of the level of attention of the driver at the moment of the fact, for example. Without this rule,

[122] RSO 1990, H.8, s 193(1).
[123] *Ibid*; RSA 2000, c T-6, s 186.

establishing the driver's liability for negligence would be too difficult – as it happens in provinces without the same rule.

Several cases in Ontario have been decided through the reverse onus of proof. In *Booth v Sault Ste Marie (City of)*, a cyclist was hit by the side of a bus during an overtake.[124] In front of both the cyclist and the bus was a parked car, which both were approaching and planning to pass. The Ontario Court of Justice held that the bus driver should have allowed sufficient distance from the bicycle while overtaking it – and that it was reasonable for the cyclist to imagine the driver would do so. The reverse onus of proof was essential in this case, because it was held that the driver did not prove that he was not negligent while overtaking the bicycle.

Pelletier v Ontario establishes that having the right of way is insufficient to prove that the driver was not negligent.[125] In this case, the Ontario Superior Court of Justice held that a cyclist was contributorily negligent because he was riding on the sidewalk and without any lights. The driver was considered to have the right of way, but, according to the Court, that was not enough to prove that he was not negligent. It was held that the driver should have reduced speed since the intersection he was crossing was a busy one.

Another interesting case on the reverse onus of proof is *DeJussel v Hajzer*.[126] In this case, a driver was held partially liable for hitting a cyclist on a highway in which bicycles were forbidden. The cyclist was considered contributorily negligent for not using lights and for riding where it was not allowed. However, the Ontario Supreme Court held

[124] 1994 CarswellOnt 5684.
[125] 2013 ONSC 6898.
[126] 1948 CarswellOnt 221.

that the fact that bicycles were forbidden was not enough to discharge the driver from its duty of proving he was not negligent.

The importance of Ontario's reverse onus of proof is highlighted when compared to case law in other jurisdictions. In British Columbia, for example, such a rule does not exist. As a result, in *Miles v Kumar*, the British Columbia Supreme Court dismissed an action by a cyclist against the driver that hit him.[127] The driver did not advance any positive defence and chose not to testify, relying simply on the argument that the cyclist did not prove her negligence. In this case, the cyclist was wearing a high visibility jacket with rear lights on at 10am. He checked twice whether it was safe to change lanes and signaled before moving to the next lane. Despite of all these elements taken as fact by the court, it was decided that the driver's negligence was not proven.

In the same province, the British Columbia Court of Appeal held in *McIlvenna (Litigation Guardian of) v Viebig* that the cyclist hit by a car at an intersection did not prove that the driver was negligent, even though the bicycle had the right of way.[128] The cyclist was six years old at the time of the collision.

As the case law demonstrates, the reverse onus of proof plays an important role in establishing the driver's liability when a cyclist is hit. It is extremely difficult to prove that a driver was negligent, since the cyclist's total obedience to the rules does not suffice. The lack of this rule in British Columbia has resulted in cyclists not being compensated at all for their injuries sustained in collisions with motor vehicles. This not only leaves cyclists unprotected, but also creates a permissive environment surrounding

[127] 2013 BCSC 1688.
[128] 2008 BCCA 105.

the drivers' conduct, supported by the fact that, as long as a driver respects all the rules of the road, it is okay to kill or injure cyclists.

Overtake distance

In Ontario, a motor vehicle driver must allow a minimum safety distance of one metre from the bicycle during overtake.[129] Some jurisdictions outside of Canada determine a higher distance. In both Brazil and Portugal, the safety distance to pass a cyclist is 1.5 metres.[130] Although many provinces in Canada do not have such a rule, it is generally established that a driver has to secure all road users' safety while passing another vehicle.

In *Booth Estate v Sault Ste. Marie (City)*, the failure of the bus driver to allow a safe distance when overtaking the cyclist, resulting in a collision with the latter, was an important element for the Ontario Court of Justice to determine the driver's liability to the damages caused to the cyclist.[131] A different result, however, came from *Ryder v Gray Coach Lines Ltd*.[132] In this case, the Ontario Court of Appeal had to decide who, between two drivers, was liable for the death of a cyclist. The cyclist was passing a parked car, while a bus driver was overtaking the cyclist. The motorist of the parked car opened the door, causing the cyclist to fall under the bus's rear wheel. The court held that the driver of the parked car was fully liable for that death. Therefore, it did not consider that the bus driver should have left more distance from the cyclist.

[129] *Ontario Highway Act*, supra note 122, s 148(6.1).
[130] Art 201 Brazilian Traffic Code; art 18, 3. Road Code (Portugal).
[131] *Booth v Sault Ste. Marie (City of)*, *supra* note 124.
[132] 1951 CarswellOnt 240.

Despite British Columbia's cycling advocates' demands,[133] the province does not have a specific safe passing distance rule regarding bicycles. However, the *Motor Vehicle Act* (MVA) determines that a driver has to maintain a safe distance when overtaking another vehicle.[134] The Government of British Columbia's website suggests drivers maintain a distance of one meter from cyclists.[135] Case law also asserts the driver's role to keep a safe distance in British Columbia. In *MacEachern (Committee of) v Rennie*, the British Columbia Supreme Court determined that the driver had to maintain a safe distance from a cyclist.[136] In this case, it was held that, even if the cyclist was in another lane, it was not enough for the truck driver to avoid crossing the "fog line". The driver's failure to maintain a safe passing distance resulted in a collision with the cyclist, for whose damages the driver was held liable. The cyclist, however, was held contributorily negligent because she could have waited for the truck to have passed before she tried to go around the vehicle parked on the shoulder where she was riding. In *Dupre v Patterson*, the same Court held that a car driver was totally liable for the damages caused to a cyclist hit during an overtake for failing to maintain a safe distance.[137] The cyclist was held not to be contributorily negligent, even though she was not riding as far right as possible, as determined by the MVA.[138]

Case law shows that the one metre rule in Ontario had not affected tort cases to date, since securing safety while passing another vehicle is a general rule that is sufficient

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[133] "Motor Vehicle Act", online: *British Columbia Cycling Coalition* <https://www.bccc.bc.ca/motor_vehicle_act>.
[134] RSBC 1996, c 318, s 157(1)(a).
[135] Ministry of Transportation and Infrastructure, "Drivers & Cyclists - Province of British Columbia", online: *British Columbia* <https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/traveller-information/routes-and-driving-conditions/drivers-cyclists>.
[136] 2010 BCSC 625.
[137] 2013 BCSC 1561.
[138] *Motor Vehicle Act*, *supra* note 134, s 183(2)(c).

for liability assessments. The rule, however, is not at all useless. It can be enforced by the police and is also a reference for drivers who otherwise might not have an idea of how much distance should be kept from cyclists.

Dooring

A common collision cause between cyclists and drivers is dooring. Dooring is the act of hitting a cyclist by opening the door of the vehicle.[139] Safety campaigns have urged drivers to look for cyclists before opening the door. A measure to ensure this is called the Dutch Reach, which consists of opening the door with the right hand, forcing the driver to move the body to have a better view of oncoming traffic.[140] *The Vienna Convention on Road Traffic* prohibits drivers from opening the door without securing that other road-users will not be endangered.[141] Although Canada is not a party to the Convention,[142] provinces generally have similar legislation regarding opening doors with caution. In Ontario, the HTA prohibits opening the door of a motor vehicle without ensuring that this act will not endanger other persons or vehicles.[143] British Columbia's MVA prohibits opening the door of a motor vehicle on the side of moving traffic unless it is safe to do so.[144]

In the Ontario case, *Ryder v Gray Coach Lines Ltd*, a motorist was held liable for the damages caused after the door was opened carelessly, hitting a cyclist that

[139] William Hunter et al, "Evaluation of Shared Lane Markings in Cambridge, Massachusetts" (2011) 2247 Transportation Research Record: Journal of the Transportation Research Board 72 at 1.
[140] Rick Sheiber, "Massachusetts Urban Bicycle Preparedness" (2017), online: *ScholarWorks* <https://scholarworks.umb.edu/instruction_capstone/30> at 6–7.
[141] *Convention on Road Traffic*, 1968, art 24.
[142] United Nations, "Convention on Road Traffic" (24 June 2018), online: *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XI-B-19&chapter=11&Temp=mtdsg3&clang=_en>.
[143] *Highway Traffic Act*, *supra* note 134, s 165(1)(a).
[144] *Motor Vehicle Act*, *supra* note 134, c 318, s 203(1).

subsequently fell under a bus wheel.[145] The liability fell entirely on the car driver, since the bus driver was not held liable for failing to maintain a safe distance from the bicycle. A similar case happened in Manitoba, *Frederick v Northern Taxi Limited*.[146] A cyclist was struck by a door opened carelessly by a taxi driver, subsequently falling under a truck's wheel. The Manitoba King's Bench held that the taxi driver was fully liable for the damages caused to the cyclist.

Further, in Ontario, in *Evans v Toronto (City of)*, a cyclist fell after hitting a car's door that was opened abruptly on a road that was considered a bicycle route before the incident.[147] The cyclist was found to be contributorily negligent for failing to use a helmet and not checking the interior of the car. The City of Toronto was also held liable, because of the bad conditions of the road. The driver who opened the door irresponsibly was held only 50% liable.

Safety campaigns should be advertised in order to make it a habit to look for cyclists before opening doors, and statutes need to be changed to specify this obligation with proper fines. Even without specific norms regarding *dooring*, however, courts in Canada have been aware of the problem in tort cases, finding drivers negligent when they hit a cyclist with the vehicle's door.

Cyclist helmets

One of the most controversial topics regarding cycling as means of transportation is the use of the helmet. Some jurisdictions inside and outside Canada require all cyclists to wear it, while others require it only for children or do not require it at all. Heated

[145] *Ryder v Gray Coach Lines Ltd*, *supra* note 132.
[146] 1948 CarswellMan 73.
[147] 2004 CarswellOnt 4721.

discussions occur about whether helmets should be mandatory. Academic research is available proving points on both sides of the debate.[148]

The introduction of the helmet topic when it comes to modern cycling safety is a distortion. Historically, bicycle helmets were invented to protect cyclists falling by themselves onto the pavement.[149] They harken back to the era of the high-wheelers, a bicycle which caused many cyclists to fall due to its design.[150] The use of bicycle helmets was deemed as a matter of individual choice until race organizers made them mandatory.[151] Due to the competitive nature of a race, the risk of a cyclist falling is naturally high, which makes helmets important as safety equipment.

The advent of the safety bicycle saw the risk of falling decrease dramatically, which brought seniors and women to use bicycles as means of transportation. The "macho bicycles," on which men would show their bravery by facing the risks of the high-wheelers, gave way to the modern vehicle whose risk of falling in controlled environments is extremely low. The use of a helmet, which had never been popular for means of transportation, by an experienced cyclist in these circumstances became

[148] See for example D L Robinson, "Head Injuries and Bicycle Helmet Laws" (1996) 28:4 Accident Analysis & Prevention 463; Susan T Borglund, Janice S Hayes & Jeanne M Eckes, "Florida's Bicycle Helmet Law and a Bicycle Safety Educational Program: Did They Help?" (1999) 25:6 Journal of emergency nursing 496; Hanyu Ni et al, "Evaluation of a Statewide Bicycle Helmet Law Via Multiple Measures of Helmet Use" (1997) 151:1 Archives of pediatrics & adolescent medicine 59; Peter C Scheidt, Modena H Wilson & Melvin S Stern, "Bicycle Helmet Law for Children: A Case Study of Activism in Injury Control" (1992) 89:6 Pediatrics 1248; Paul Scuffham et al, "Head Injuries to Bicyclists and the New Zealand Bicycle Helmet Law" (2000) 32:4 Accident Analysis & Prevention 565; Matthew Taylor & P Scuffham, "New Zealand Bicycle Helmet Law—Do the Costs Outweigh the Benefits?" (2002) 8:4 Injury Prevention 317; David E Wesson et al, "Trends in Pediatric and Adult Bicycling Deaths Before and After Passage of a Bicycle Helmet Law" (2008) 122:3 Pediatrics 605.

[149] "History Tuesday: The Bicycle Helmet", (14 May 2013), online: *Davison* <https://www.davison.com/blog/2013/05/14/history-tuesday-the-bicycle-helmet/>.

[150] Randy Swart, "Bicycle Helmet History", (8 October 2017), online: *Helmets* <https://helmets.org/history.htm>.

[151] Petty, *supra* note 97 at 207.

pointless. The motorization of the streets, however, increased the danger of the roads, elevating the number of deaths and injuries in all modes of transportation. Bicycles were not immune to this, with a high number of cyclists starting to be killed or injured by drivers every year.

The debate over helmet use to avoid part of these deaths, however, did not come simply from the existence of the deaths themselves. Even more pedestrians and motor vehicle drivers and passengers die yearly from road crashes. If helmets resulted only from an intention to avoid deaths, they would be recommended and made mandatory for pedestrians and motor vehicle drivers and passengers as well. Nonetheless, that did not happen.

As discussed in the last chapter, the advent of the automobile came with a great investment by the motor industry to stabilize the notion that cars belong to the roads. Motordom's strategy was a reaction to safety movements that denounced that cars were catastrophically elevating the number of road deaths. With the stabilization of that notion, traditional road users, as cyclists, not only had to share the road with the danger of the automobiles surrounding them, but also had to face new allegations that bicycles do not belong to the road. This false assumption is still very strong in Canada, with Ford's opinion that cyclists are to blame for their own deaths because roads were made for cars.[152] In Windsor, city councillor Paul Borrelli tweeted that he saw cyclists riding "nicely" on sidewalks,[153] provoking response from cycling advocates saying that cycling

[152] Margolis, *supra* note 84.
[153] "Windsor Coun. Paul Borrelli Sparks Debate on Sidewalk Cycling", (5 July 2017), online: *CBC News* <https://www.cbc.ca/news/canada/windsor/windsor-coun-paul-borrelli-sparks-debate-on-sidewalk-cycling-1.4191917>.

on sidewalks is, and should be, prohibited.[154] The decrease of the perception that bicycles belong to the road made sport and leisure cycling the main image of bicycling, with the importance of competitions such as the Tour de France and the growing habit of group riding for leisure taking over the social perception of bicycles. This confusion is illustrated in Bekka Wright's cartoon in which the author shows the amount of sport cycling questions she receives when people see that she commutes by bicycle.[155] As a response for these questions, she drew a person dressed as a Formula One driver in order to drive a car to work.[156]

It is the strong image of sport cycling that creates the perceptive relationship between cycling and helmets. In places where the cycling commute is popular – such as Holland or the poor suburbs of Brazil, or even in North America before the advent of the automobiles – helmet use has never been a norm. The influence of sport cycling in the social image of bicycles created the idea of helmet use to avoid deaths and injuries of cyclists, even though the deaths and injuries caused by the advent of the automobiles affected all road users with no exception.

Many studies have been made to demonstrate the consequences of mandatory helmet laws. It has been mainly proven that these laws increase bicycle helmet use and decrease cyclists' head injuries.[157] However, helmet laws for motor vehicle occupants

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[154] Christopher Waters, "Opinion: Let's Make Sidewalk Cycling a Thing of the Past" (13 October 2017), online: *Windsor Star* <http://windsorstar.com/opinion/columnists/opinion-lets-make-sidewalk-cycling-a-thing-of-the-past>.
[155] Bekka Wright, "Utility vs. Sport" (26 November 2013), online: *Bikeyface* <http://bikeyface.com/2013/11/25/utilityvsport/>.
[156] *Ibid*.
[157] Robert S Thompson, Frederick P Rivara & Diane C Thompson, "A Case-Control Study of the Effectiveness of Bicycle Safety Helmets" (1989) 320:21 New England Journal of Medicine 1361; M

could be 17 times more effective preventing head injury than bicycle helmet laws, according to a research that compares the number of head injuries in different modes of transportation in Australia.[158] Indeed, scientists are part of society and, therefore, tend to carry social assumptions, which includes the idea of who belongs to the road and the constructed image of bicycles, with its relation to helmets. Ulrich Beck has long advocated for the opening up of the decision-making processes of sciences, since they are based on "relations of definitions" that are the "hidden power-structure of risk conflicts."[159] If legal and political decisions are based on scientific conclusions, it is important to scrutinize the definitions that influence the results achieved in science. When it comes to helmet law, it is the imagery of sport cycling present in the mind of some scientists that results in the conclusion that helmets should be mandatory for cyclists, while ignoring that the same methods would lead to the same conclusion in respect to helmets for motor vehicle occupants and pedestrians.

Cycling advocates have argued that helmet laws negatively influence the use of bicycles, resulting in the decrease in health benefits caused by cycling outweighing the alleged decrease in head injuries. Although there is a lack of relevant research evaluating the specific effect of helmet laws in decreasing bicycle use,[160] it has been noted that bike-share systems tend to fail in places where helmets are mandatory.[161]

Karkhaneh et al, "Effectiveness of Bicycle Helmet Legislation to Increase Helmet Use: A Systematic Review" (2006) 12:2 Injury Prevention 76.

[158] Robinson, *supra* note 148.

[159] Ulrich Beck, *World Risk Society* (Malden: Polity Press, 2001) at 5.

[160] A Macpherson & A Spinks, "Cochrane Review: Bicycle Helmet Legislation for the Uptake of Helmet Use and Prevention of Head Injuries" 3:1 Evidence-Based Child Health: A Cochrane Review Journal 16.

[161] Elliot Fishman, Simon Washington & Narelle Haworth, "Bike Share: A Synthesis of the Literature" (2013) 33:2 Transport Reviews 148 at 19–21.

In tort law, the artificial relationship between urban cycling and helmets has played a relevant role in denying cyclists full compensation for damages caused by motor vehicle drivers. Even though Ontario has no mandatory helmet law for cyclists over 18 years old, it has been decided that not wearing a helmet constitutes contributory negligence.[162] However, there has to be evidence that a helmet would prevent or mitigate the damages – even in British Columbia, where helmets are mandatory for cyclists of all ages.[163] In *Krudwig v Johnston*, the Ontario Court of Justice denied the existence of contributory negligence because there was no evidence that it would have made any difference on the damages, but also because "there was no law requiring the plaintiff to wear a bicycle helmet."[164] None of these decisions provide any justification for imposing contributory negligence, which leads to the conclusion that the court judges simply assumed that cyclists should be wearing helmets, except in *Krudwig v Johnston*. Only a short discussion on helmet use is found in *Labanowicz v Fort Erie (Town)*, in which a witness doctor was reported to cite the percentage of brain injuries avoided by helmets.[165] The court's decision in this case, however, was for the inexistence of contributory negligence, which should be proven on a case-by-case basis.

No case law has determined contributory negligence of pedestrians or car occupants for not wearing helmets. Decisions on cyclists' contributory negligence for that reason, therefore, are an injustice caused by the imaginary relationship between urban cycling and helmets. In the United States, the city of Deerfield, Illinois, came to a

[162] *Evans v Toronto (City of)*, *supra* note 147.
[163] *MacEachern (Committee of) v Rennie*, *supra* note 136; *Labanowicz v Fort Erie (Town)*, 2017 ONSC 630, *Hallatt v Levien*, 2006 BCSC 353, 149 ACWS (3d) 916 at 45.
[164] *Krudwig v Johnston*, 1998 CarswellOnt 4775.
[165] *Labanowicz v Fort Erie (Town)*, *supra* note 163 at 80.

solution for that injustice: the section in the Municipal Code that requires helmets for persons under the age of 16 clearly states that the violation of this same section does not constitute negligence or contributory negligence:

> A violation of this Section shall not constitute negligence, contributory negligence, assumption of risk, be considered in mitigation of damages of whatever nature, be admissible in evidence, or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation of any bicycle, or participation in skateboarding or in-line skating, nor shall anything in this Section change any existing law, rule or procedure pertaining to any civil action.[166]

Helmet laws for urban cycling are a distortion caused by the presence of sport cycling imagery. Although more relevant research is needed, helmet laws produce the unintended consequences of discouraging cycling. While they do reduce head injuries, they would be 17 times more efficient to reduce head injuries for car occupants if they were mandatory. The imposition of contributory negligence for not wearing a helmet causes the denial of the total compensation that the cyclist deserves due to the negligence of drivers. As a result, the driver pays less for the inflicted damages, the cyclist is not fully compensated, and there is no evidence whatsoever that the imposition of contributory negligence has had any efficacy in reducing injuries and deaths. It is unjust, ineffective, and should be abolished in all jurisdictions.

Cyclists passing on the right

In order to organize the roads, rules regarding overtakes have been established. Generally, lane speeds are lower on the right and faster on the left. Overtakes are expected to be made on the left lane, and the driver is expected to return to the right lane after passing the other vehicle. All these rules were, naturally, made with motor vehicles

[166] *Municipal Code of Deerfield*, s 22-121A.

in mind. Their increased danger requires more specific rules and their size require a more rigid order on the roads. For the same reasons, no overtaking rules exist for pedestrians on sidewalks. Cyclists, however, were deemed vehicles by the courts, which artificially imposed on them rules made for the logics of, before, horse carriages and, now, motor vehicles. As a result, the general prohibition of passing on the right applies to bicycles.

Cyclists passing on the right are a common image on the roads when cars are stopped before them. Almost as a confession, Forcese says that he "has certainly imagined he travels up an invisible bike lane to the right of stalled traffic."[167] That is not at all illogical. It is not reasonable to demand that a cyclist waits before stopped cars, considering that one of the social benefits of the bicycle is not causing traffic jams. Since cyclists generally travel on the right, it is natural that the overtake occurs on the right. When a bike box – a reserved space for cyclists to wait before the red light in front of other stopped vehicles – is installed, it is recommended that an ingress lane for bicycles is placed on the right, so that cyclists can comfortably pass stalled vehicles.[168]

In Brazil, advocates rely on article 211 of Código Brasileiro de Trânsito, which prescribes that non-motorized vehicles may pass vehicles stopped due to traffic signals.[169] With no such prescription, Canadian courts have varied their interpretation on the matter. In British Columbia, courts have been severe against cyclists passing on the right. In *Ilett v Buckley*, the British Columbia Court of Appeal held that a cyclist was contributorily

[167] Forcese & LaViolette, *supra* note 94 at 69.
[168] National Association of City Transportation Officials, "Bike Boxes", online: *National Association of City Transportation Officials* <https://nacto.org/publication/urban-bikeway-design-guide/intersection-treatments/bike-boxes/>; Atkins Services, *Advanced Stop Line Variations Research Study* (October 2006), online: National Association of City Transportation Officials <*https://nacto.org/wp-content/uploads/2010/08/Advanced-Stop-Line-Variations-Research-Suty.pdf*> at 10–2.
[169] Art 211 Brazilian Traffic Code.

negligent for a collision at an intersection because he infringed the statutory prohibition to pass on the right.[170] The cyclist, however, did so "at speed", which means that the fact that he passed on the right was not considered alone. It is important to notice that the cyclist was on the right shoulder of a highway. It would be absurd to suggest that cyclists on the right shoulder should stop before motor vehicles on travel lanes. The court, however, did not bother to explain what a cyclist should do to avoid infringing the law in that situation.

An even more unreasonable decision was made by the same court in *Ormiston (Litigation guardian of) v Insurance Corp. of British Columbia*.[171] In this case, a van was stopped in the right lane, close to the centre line and three feet from the fog line. The 16-year-old cyclist decided to pass the van on the right, when it, for no apparent reason, abruptly accelerated moving to the right, going around a foot and a half to two feet over the fog line. It did not hit the cyclist, but caused him to lose his balance, cross the right shoulder and fall down a rocky embankment. The court came to the absurd conclusion that, even if the driver had seen the cyclist in the mirror, he could have made the same movement, since it was "the vehicle's lane."[172] Endangering the life of a human being is justified if the sanctity of the motor vehicle's lane is threatened. It was concluded that the cyclist did a "foolish thing" and was "the sole author of his misfortune."[173]

[170] 2017 BCCA 257 at 25.
[171] 2014 BCCA 276 [*Ormiston*].
[172] *Ormiston, supra* note 171.
[173] *Ormiston, supra* note 171 at 21.

In *Hill v Reekie*, the British Columbia Supreme Court denied any compensation for a cyclist that hit a trailer while he was attempting to pass the trailer on the right.[174] The cyclist lost his balance and fell under the rear wheels of the motor vehicle. The court defined the occurrence as a "highly unfortunate accident."[175] The case shows the assumption and acceptance by the British Columbia Supreme Court that roads are a space in which little mistakes can result in heavy injuries. The motor industry invested heavily to establish this assumption in the first decades of the automobile, and now it is secured by the courts.

Courts in Nova Scotia, New Brunswick and Ontario have been less severe than those in British Columbia. In *Birch v Eastern Dairyfoods Co-Operative Ltd*, the Supreme Court of Nova Scotia stated that "it would be illogical to say a cyclist must pass on the left in traffic when he is required to drive on the extreme right."[176] In this case, a truck driver hit a cyclist while turning into a driveway to the right. Although the cyclist was held contributorily negligent, it was not due to the fact that he was passing on the right.

This decision cites a previous case from New Brunswick on the same line of thought. In *Guimont v Williston*, the New Brunswick Court of Appeal stated that "[i]t would not be logical to require that a bicycle rider pull out toward the centre of the highway to pass ordinary moving traffic on the highway; the speed at which a bicycle travels would not justify such a requirement."[177] Passing on the right did not constitute contributory negligence in this case as well.

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[174] 1998 CarswellBC 33 at 22.
[175] *Hill v Reekie*, supra note 174 at 24.
[176] [1986] NSJ No 50.
[177] [1980] NBJ No 103 at para 7.

Similar reasoning is applied in Ontario. In *Tiessen v Lackner*, the Ontario County Court held that "[t]o hold that a cyclist cannot pass without moving to the left on a two lane or multi-lane roadway would be a ridiculous conclusion and contrary to the established practice."[178] Interestingly, the court held that the prohibition of passing to the right refers only to motor vehicles. Indeed, the HTA states specifically the words "motor vehicle" in section 150 (1), which permits passing on the right only in certain situations.[179] As mentioned by the court, "that Section only applies to motor vehicles and, while a bicycle is a 'vehicle' it is not a 'motor vehicle.'"[180]

It would be interesting to know why the British Columbia MVA prohibits all vehicles from passing on the right, while the Ontario HTA only prohibits motor vehicles. Most probably the respective section in the MVA was not thought of for vehicles that are not motorized. Bicycles were simply not thought about in that situation, and it was taken to the courts to rule over them. As a result of a literal and blind application of the statute, the British Columbia courts ended up holding that cyclists cannot pass on the right. This conclusion is at extreme odds with the dynamics of the bicycle, as concluded by the courts in Ontario, Nova Scotia, and New Brunswick, and as ruled in the Brazilian traffic code.

Motor vehicles turning to the right

A common source of conflicts between motor vehicle drivers and cyclists is the right turn by the motor vehicle. Since cyclists are legally obligated to ride on the right, drivers who intend to turn to the right should wait behind the cyclist at a safe distance

[178] [1979] OJ No 285 at para 15.
[179] *Highway Traffic Act*, *supra* note 122, s. 150 (1).
[180] *Tiessen v Lackner*, *supra* note 178 at 14.

until it is possible to turn right safely. Although only seconds are lost in this procedure, it is common that drivers try to pass the cyclist quickly in order to turn to the right in front of them. As a result, cyclists are hit or lose their balance, falling to the ground. When motor vehicles are stopped or travelling at a slow speed, it is common for cyclists to pass on the right, as seen in the previous section. In this situation, it is important for the driver to watch for cyclists in the mirror.

In the Ontario case, *Krudwig v Johnston*, a truck driver was held 100% liable for hitting a cyclist while turning to the right without signaling.[181] The cyclist was passing the truck on the right at that time, but this fact was not raised by the defendant as a possible cause for contributory negligence. In *Dolphin v Lepine* the British Columbia Supreme Court held the cyclist contributorily negligent in a similar situation.[182] Most importantly for this section is that the driver was held partially liable for not looking out for cyclists when turning to the right – more specifically for not doing a right shoulder check. Therefore, even though the court understood that cyclists cannot pass on the right, it did not disregard the driver's role to look out for them. Unfortunately, the same court came to a different conclusion in *Sivasubramaniam v Franz*.[183] In this case, the cyclist was on the right shoulder and stopped at the red light beside a truck. When the light went green, the truck driver did a right turn, hitting the cyclist. The court held the cyclist totally liable because he should not be riding on the shoulder. Since it is an area not designated for vehicles, the court understood that the cyclist had the duty to assure that he was visible to drivers on the road. The relevant difference to *Dolphin v Lepine* is that, in the latter, the

[181] *Krudwig v Johnston*, *supra* note 164.
[182] [1999] BCJ No 103 at para 41.
[183] [2008] BCJ No 1533.

driver did not do a right shoulder check, which would have allowed him to see the cyclist and, therefore, avoid the collision. The breach of this duty constituted negligence, according to the British Columbia Supreme Court. As *Sivasubramaniam v Franz* shows, the court understands that, as long as all the statutory duties are met, drivers are allowed to hit cyclists with no liability.

Riding on the shoulder

Debating whether a cyclist should ride on the shoulder is one of the unreasonable consequences of the motorization of road infrastructure and laws. At a motorized standpoint, driving on the shoulder is forbidden because it would undermine its capability of providing a space for emergencies. Allowing driving on the shoulder would simply transform it into a regular traffic lane. Moreover, it would be dangerous for people stopped on the shoulder in a situation of emergency. Bicycles do not cause such threat. In fact, riding on the shoulder may be safer for cyclists, who have to constantly be concerned about drivers overtaking them in the traffic lane. The legal prohibition of driving on the shoulder was intended for motorized vehicles. Some jurisdictions clearly state that cyclists may ride on the shoulder, as an exception to the prohibition, such as Ontario.[184] Others, such as British Columbia, apply the statute norms strictly, disallowing cyclists on the shoulder for no other reason than the literal application of a law not made for them.

Two cases in British Columbia show how the prohibition of cyclists on the road result in cyclists being denied compensation for their losses. In *Ormiston*, the British Columbia Court of Appeal held that the cyclist was solely responsible for being hit by a

[184] *Highway Traffic Act*, *supra* note 122, s 156 (3).

van.[185] The cyclist was passing the van on the right on a road that had a right shoulder. The court decided that the driver was not responsible for looking for cyclists on the shoulder since they are forbidden there. The British Columbia Supreme Court had the same understanding in *Sivasubramaniam v Franz* discussed in the previous section.[186] The same Supreme Court, however, came to a different conclusion in *MacEachern (Committee of) v Rennie*, in which it was stated that the driver of a large commercial vehicle "had a duty to provide enough room for pedestrians and cyclists to proceed safely along the shoulder. It was not enough for him simply to keep his vehicle from encroaching onto the nominal fog line."[187]

Although, differently from Ontario, British Columbia does not have a statutory exception to allow bicycles on the shoulders, that does not mean that the courts are obligated to apply the statutes literally. Simply by recognizing that the prohibition to drive on the shoulder was meant for motor vehicle drivers, the courts could infer that cyclists are allowed there. Even more importantly, denying cyclists any compensation after being struck by motor drivers sends the message that drivers do not need to check the shoulder before entering it or taking a right turn. In other words, the courts would be saying that there is no reason to avoid a death if you comply with the statute.

Cyclists entering the road

Case law in Canada shows that conflicts tend to happen at the moment that cyclists enter the road. As a universal rule, the vehicle driver already on the road has the preference. Cyclists should wait until it is safe to enter the road. It is also important for

[185] *Ormiston*, *supra* note 171.

[186] *Sivasubramaniam v Franz supra note* at 183.

[187] *MacEachern (Committee of) v Rennie*, *supra* note 136.

drivers to keep looking for other vehicles, cyclists or pedestrians who may enter the road, especially if they are children. The mere presence of children, however, does not automatically imply liability.[188] Liability may fall upon the municipality due to a bad design of a road.

In the Ontario case, *Bartosek (Litigation guardian of) v Turret Realties Inc.*, a six-year-old cyclist was held contributorily negligent, while the driver was held not liable.[189] The cyclist was struck after entering the road through a ramp whose visibility from the street was impeded due to a concrete wall. The occupier of the premises was held liable due to the wall, while the cyclist was held contributorily negligent because he "was aware of the danger that riding down the ramp presented."[190] Also in Ontario, in *Repic v Hamilton (City of)*, three parties were held liable for a collision between a car and a bicycle.[191] The cyclist was a 14-year-old boy who was riding on a bicycle path. The bicycle path ended abruptly with an exit ramp that turned into a road. The cyclist was struck right after entering the road. He was held 45% liable for failing to stop and to use the lights. The driver was held 40% liable because he should drive carefully by expecting someone to come from the exit ramp. The City of Hamilton was also held liable, since the design of the bicycle path, ending abruptly on the road, contributed to the collision.

In *Chiasson*, a truck driver was held liable for hitting a six-year-old cyclist.[192] The cyclist was cycling on the driveway, but suddenly entered the road, and was struck by the motor vehicle. The New Brunswick Court of the Queen's Bench considered that the

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[188] *Chiasson (Litigation guardian of) v Baird*, 2005 NBQB 102 at para 83 [C*hiasson*].
[189] *Bartosek (Litigation guardian of) v Turret Realties Inc.*, [2001] OJ No 4735. [Bartosek]
[190] *Bartosek*, *supra* note 189 at para 24.
[191] *Repic v Hamilton (City of)*, [2009] OJ No 4657.
[192] *Chiasson*, *supra* note 188.

driver should have driven slower due to the common presence of children in the area. The cyclist was held 50% contributorily negligent for entering the road suddenly.

The situation of a cyclist being struck by a motor vehicle after entering the road is one of those in which a driver may be considered not liable by case law depending on the circumstances. Since many such cases involve children, whose behaviour is naturally riskier, this means that the roads are deemed to be places in which many children will inevitably die. It appears that, while, in New Brunswick, drivers need to pay attention in areas where there usually are children playing, Ontario does not expect drivers to avoid killing children in this situation except if the road infrastructure is unclear.

Wrong way

In an attempt to organize the flow of pedestrians on the sidewalks of Avenida Rio Branco, in the city of Rio de Janeiro, it was decided in the 1900's that each sidewalk would go to a different direction.[193] Pedestrians going northbound would be on one side; on the other side would be people walking southbound. This did not work, and now Avenida Rio Branco's sidewalks go both ways as any other sidewalk.

Pedestrians have always decided where to walk based on convenience and customs. In fact, the flow of pedestrians is rarely as dangerous and capable of causing public nuisance as that of car traffic. Since the first law demanding traffic to keep to one specific side of the road in London in 1756, the legal rule has intended to organize the flow of carriages.[194] As João Lacerda argues, "wrong way is a concept applicable to the

[193] João Lacerda, "Fluxos e Seus Sentidos" [Flows and Their Reasons] (31 March 2010), online: *Transporte Ativo* <http://transporteativo.org.br/wp/2010/03/31/fluxo-sentido/>.
[194] *New Scientist* (1987) at 16.

flow of machines, not people."[195] Although one-way roads have existed since the Roman era,[196] the vast majority of streets in modern cities were two-way, until some were transformed into one-way streets in order to organize motor vehicles.[197]

Deemed in law as carriages, bicycles are expected to follow road conventions. The wrong way is therefore legally applicable to them. Since it is a human-propelled machine, however, bicycle travels tend not to fit the dynamics engineered for cars. As much as it is far and inconvenient for a pedestrian to cross the street to go to the opposite direction, as was intended in Avenida Rio Branco, it is frequently far and inconvenient for a cyclist to head to another street in order to take the correct way.

In a motorized city, there is no safe option for the cyclist but to obey the rules regarding the right way – or to dismount and go on the sidewalk as a pedestrian. Cycling in the wrong way may indeed increase risks significantly for the cyclist. However, since the compliance is often too inconvenient, it is a natural behaviour for people moving with their own body's energy to take the easiest route. This means that the traffic structure and law encourage risky behaviour. The solution for this is already found in some jurisdictions around the world: legalizing contraflow. Contraflow differs from the wrong way because, being legal, cyclists are expected to move in the opposite direction. In Germany, France, Belgium, and the Netherlands, contraflow is standardized in one-way residential streets.[198] Contraflow makes the streets safer in three ways: it makes the

[195] "[...] mão e contra-mão é um conceito que se aplica aos deslocamentos de máquinas, não de pessoas." Lacerda, *supra* note 193 [translated by author].
[196] Edward Mueller, "Aspects of the History of Traffic Signals" (1970) 19:1 IEEE Transactions on Vehicular Technology 6 at 6.
[197] François Gagnon, *Two-way Cycling on Local, One-way Streets*, Knowledge Sharing and Public Policy Series (National Collaborating Centre for Healthy Public Policy, 2016) at 2.
[198] John Pucher & Ralph Buehler, *City Cycling* (MIT Press, 2012) at 129.

presence of cyclists in the opposite direction predictable; it attracts cyclists to low-speed roads in which it is implemented; and it makes the bicycle network denser.[199]

Bicycles allowed in the contraflow can be found in some Canadian cities, such as Vancouver, Toronto, and Montreal. [200] Statutes generally permit governments to implement contraflow for cyclists, although the standard norm is that bicycles have to follow the same direction as the other vehicles. In Ontario, this permission is found on section 153(2) of the HTA, stating that "[a] lane on a highway designated for the use of one-way traffic only may be designated for the use of bicycle traffic in the opposite direction."[201] Where the contraflow is not implemented, however, the courts have held the cyclist in the wrong way liable when a collision happens.

In *Morillon (Héritiers) c Godbout*, the Court of Appeal of Quebec held a cyclist contributorily negligent for both riding on the wrong side and disobeying a red light.[202] Although the cyclist was in the wrong way, the motorist who struck him was held partially liable. That is because the cyclist's wife had passed before him, also on a bicycle, so the driver should be aware that another cyclist could appear after her. This is an example of a court recognizing that a driver should not only obey the highway statute: there is a duty to avoid collisions no matter who is wrong.

In the British Columbia Court of Appeal case *Ivanoff v Bensmiller*, a cyclist was held contributorily negligent for riding on the wrong side of the road, facing oncoming

[199] Gagnon, *supra* note 197 at 2–3.
[200] *Ibid* at 2.
[201] Highway *Traffic Act*, *supra* note 122, s 156 (3).
[202] *Morillon (Héritiers) c Godbout*, [1984] CarswellQue 177 (Qc CA).

traffic.[203] He was struck by a motor vehicle driver leaving a parking lot. It certainly makes sense to consider the cyclist contributorily negligent in this case, since drivers will naturally pay more attention to vehicles coming from the correct side.

An unreasonable decision on contributory negligence, however, was made by the British Columbia Supreme Court at *Kruse v John Doe*.[204] In this case, a cyclist was struck by a truck driver who invaded the shoulder. The cyclist was on the left shoulder because he intended to turn left further ahead. Due to the circumstances of the road, the court comprehended that what the cyclist did was "more sensible" than trying to turn left from the right side.[205] The court even considered that a pedestrian would also be facing traffic, and that it is the duty of automobile drivers not to cross the fog line.[206] All this reasoning naturally leads to the conclusion that a cyclist riding on the wrong side on a shoulder does not contribute to a collision with a motor vehicle that invades the shoulder. If the driver crosses the fog line, a cyclist on either way may be hit, as much as a pedestrian. The court, however, held the cyclist contributorily negligent, by simply alleging that he was riding on the wrong side of the road. From its words, the court shows some discomfort with its own decision:

> I think very little in favour of the defendant; that is, more fault on the defendant (unknown) than on the plaintiff, because the plaintiff, in my view, was not behaving in a way that was unreasonable. That is to say, he was riding in an area that he had every reason to think was safe. He indicated that he could not get further left because of garbage cans. I suspect that that is somewhat reconstructed because he found the garbage

[203] 2002 BCCA 173.
[204] [1994] BCJ No 3277 (BCSC).
[205] *Kruse v John Doe*, *supra* note 204.
[206] *Kruse v John Doe*, *supra* note 204.

> cans, and he may well have hit the garbage cans when struck by the mirror of the pick-up truck.[207]

The court did not explain how a cyclist riding on the wrong side could contribute to a collision caused by a truck driver invading the fog line. The decision came from a general understanding that cyclists on the wrong side are at a greater risk than on the right side. That is a correct assumption when it comes to riding on the road. If the cyclist is on the shoulder, it is possible that the risk is increased – for example, at intersections, where drivers are more regardful of vehicles coming from the correct side – however the contribution to the collision should be addressed on a case-by-case basis.

Failing to stop at the red light

Lacerda was quoted in the previous section saying that the wrong way is a concept applicable for machines and not for people.[208] The same idea applies to traffic lights. Although the history of the first signal lighting for land transportation goes back to 1857, it was not until 1913 that the first mechanical traffic light appeared in the United States, more specifically in Detroit. As seen in the first chapter, the first decades of the 20th century were marked by the emergence of the conflicts caused by the automobile, with several deaths and injuries as a result. This emergence caused the introduction of several measures in an attempt to organize traffic. In this new scenario of chaos, traffic lights were found to be necessary.

Bicycles, deemed as vehicles, have to obey traffic lights. As happens with other car-oriented measures, these are not meant to organize the flow of bicycles, yet no solutions for them are usually put in place, causing cyclists to fall into the general rules

[207] *Kruse v John Doe*, *supra* note 204 at para 12.
[208] Lacerda, *supra* note 193.

applied to vehicles. Exceptions for that exist, however, and it is important to take a closer look at them.

In Idaho, cyclists may treat red lights as stop signs and stop signs as yield signs. This means that, when facing a red light, cyclists must stop, but may proceed with caution if there is no vehicle coming to the intersection at the green light. When facing a stop sign, cyclists do not need to stop completely, but only reduce the speed and proceed in case it is safe to do so. This rule, known as the Idaho Stop, has existed in Idaho since 1982.[209] Much later, in 2017, Delaware followed Idaho's path, allowing cyclists to treat stop signs as yield signs, but only in streets with 2 or fewer lanes.[210] Similar although not identical rules exist in cities such as Paris, in France, and Breckenridge, Dillon, and Aspen, in Colorado, United States.[211] The County of Summit, also in Colorado, has introduced similar rules.[212] Equivalent legislation has been proposed in several other cities, including Edmonton, Alberta.[213]

The experience of cycling is enough to convince anyone that the dynamics of the bicycle are different from that of motor vehicles. While drivers only need to step on

[209] Jenna Caldwell & Dana Yanocha, "Is It Time to Reexamine Your Bike Code? A Review of Cycling Policies in Illinois Municipalities" (2016) 1:1 Illinois Municipal Policy Journal 109 at 116.
[210] Del Code tit 21 c 41 § 4196A.
[211] Hugh Schofield, "The City Encouraging Cyclists to Jump Red Lights" (11 August 2015), online: *BBC News* <https://www.bbc.co.uk/news/magazine-33773868>; The Rosen News Team, "Yield-Stop Bicycling Laws for Aspen and Denver?", (14 February 2013), online: *Denver Personal Injury Lawyer & Colorado Accident Attorney* <https://www.danielrrosen.com/2013/02/yield-stop-bicycling-laws-for-aspen-and-denver/>; Andre Salvail, "Bike riders will be able to yield legally at stop signs around Aspen", (22 June 2013), online: *Aspen Times* <https://www.aspentimes.com/news/bike-riders-will-be-able-to-yield-legally-at-stop-signs-around-aspen/>.
[212] *Ordinance n 2012-09*, Board of County Commissioners of the County of Summit, State of Colo.
[213] Elise Stolte, "Rolling Stop on the Table as Alberta-Wide Bike Review Launches" (26 June 2017), online: *Edmonton Journal* <https://edmontonjournal.com/news/local-news/rolling-stop-on-the-table-as-alberta-wide-bike-review-launches>.

pedals and change gears to stop and continue, cyclists spend much physical energy to do the same task. Research has shown what cyclists intuitively know:

> For example, on a street with a stop sign every 300 feet, calculations predict that the average speed of a 150-pound rider putting out 100 watts of power will diminish by about forty percent. If the bicyclist wants to maintain her average speed of 12.5 mph while still coming to a complete stop at each sign, she has to increase her output power to almost 500 watts. This is well beyond the ability of all but the most fit cyclists.[214]

Forcing cyclists to fully stop at stop signs tend to discourage cycling due to the increased effort that it requires. This factor tends to be important since streets with many stop signs tend to be a better alternative than the fast roads with traffic lights, which attract more motor vehicle drivers.[215]

Treating cyclists differently regarding traffic lights and stop signs is not only more comfortable, but also safer. The safety effects of the implementation of the Idaho Stop were studied by Jason N. Meggs, who concluded that it, contrary to the predictions of many, actually decreased the number of incidents with cyclists.[216]

A cyclist's negligence, however, may occur, Idaho Stop being legal or not. In *Bradford v Snyder*, a cyclist was held contributorily negligent for rolling at a stop sign and colliding with a van.[217] The motor vehicle driver was held 1/3 liable since she should have been paying more attention at an intersection in a playground zone. In this case, the collision would happen whether or not the Idaho Stop was implemented. The cyclist has to be sure that it is safe to cross the intersection before a stop sign.

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[214] Joel Fajans & Melanie Curry, "Why Bicyclists Hate Stop Signs" (2001) 1:18 ACCESS Magazine 28 at 29.
[215] *Ibid*.
[216] Jason N Meggs, "Bicycle Safety and Choice: Compounded Public Cobenefits of the Idaho Law Relaxing Stop Requirements for Cycling" (2010), online: *StreetsBlogDenver* <http://denver.streetsblog.org/wp-content/uploads/sites/14/2018/02/idaho-law-jasonmeggs-2010version-2.pdf> 15 at 5.
[217] [2016] AJ No 331 (Alta CA).

Apart from *Bradford v Snyder*, there is a lack of case law regarding collisions happening because a cyclist rolled through a stop sign. This is likely a result of the fact that this approach does not result in collisions if done carefully. On the other hand, several cases dealt with collisions happening because a motor vehicle driver rolled through a stop sign.[218]

In *Stalzer v Nagai*, a cyclist was held 100% liable for his injuries after colliding with a motor vehicle at an intersection.[219] The cyclist was cycling on the sidewalk and crossed along the crosswalk, ignoring the red light for pedestrians. He also had no lights on the bicycle. Similarly, in *Morillon (Héritiers) c Godbout*, a cyclist was considered contributorily negligent for both riding on the wrong side and disobeying a red light, resulting in a collision with a motor vehicle.[220] In this case, however, the motor vehicle driver was also considered negligent because he should have foreseen that the cyclist was going to do that, since another cyclist did the same thing before him.

Case law also shows that collisions happen right after the cyclist stops, mainly through dynamics that would not happen if they had proceeded as indicated in the Idaho Stop.[221] Ironically, cyclists have been held negligent in some of these cases. In *Sivasubramaniam v Franz*, the cyclist was on the right shoulder and stopped at the red light.[222] When it turned green, he proceeded, but a motor vehicle driver turned right. The cyclist was held negligent because, being in the shoulder – which is illegal in British Columbia – he should have paid attention to cars turning right. In *McKeon v Langevin*,

[218] *Matkin v Hogg*, 2015 BCSC 560; *Roberts v Willson*, 1996 CarswellBC 1918.
[219] 2014 BCSC 1388.
[220] *Morillon (Héritiers) c Godbout*, *supra* note 202.
[221] *Sivasubramaniam v Franz supra* note 183; *Stephens v Winchester*, 1976 CarswellBC 1682; *McKeon v Langevin*, 1982 CarswellOnt 3681.
[222] *Sivasubramaniam v Franz*, *supra* note 183.

the cyclist stopped at the red light and was hit by a tractor trailer driver, who was on the same lane, but proceeded to turn right at the red light.[223] The cyclist was considered contributorily negligent for failing to see the trailer's right signal light, which would allow her to watch "what the truck was doing" and "lift her bike up on to the sidewalk and step out of any area of danger."[224] This last case shows that law creates danger by demanding cyclists to ride on the right and stop at red lights at the same time as motor vehicles are allowed to turn right at red lights. More than that, the cyclist may even be held contributorily negligent for failing to escape from the dangerous maneuvers of a motorist.

Law needs to change when it comes to red lights and stop signs regarding cyclists. The experience of Idaho shows that it is safer to allow cyclists to pass red lights and roll through stop signs. As this section has shown, failing to do so creates not only danger to cyclists, but also unfair liability in tort cases.

Conclusion

As paradoxical as it might sound, cycling laws were not created for bicycling. Except for some specific cases, as in the Idaho Stop law, rules that govern cycling were not created considering the dynamics of the bicycle. Since the law of wheelmen, bicycles have been included in the category of carriages, which has had their rules created with either horse-drawn vehicles or motor vehicles in mind.

[223] *McKeon v Langevin*, *supra* note 221.
[224] *McKeon v Langevin*, *supra* note 221.

With the motorization of the roads, law also became motorized. If cyclists had to abide by rules created for horse-drawn carriages in roads made for all, now they have to deal with both motorized laws and roads. In this context, the designation of bicycles as carriages is good for cyclists to be allowed on roads that are socially perceived to be for cars. At the same time, this designation creates anomalies as many rules made for the dynamics of the cars may be inefficient for cyclists – and even dangerous.

As shown in the first chapter, with the increased number of motorized vehicles came the catastrophic number of road deaths. Those deaths became normalized because of the perception that the creator of those deaths belongs on the road. Despite the assumption that traffic laws are made to secure safety on the streets, law has followed the social trend of normalizing cars and, as a result, normalizing deaths. As a result of motordom's strategy, the killings of pedestrians and cyclists may be considered a consequence of their own failure to abide by the law, causing them to receive reduced compensation or no compensation at all.

CHAPTER 4
PATHS TO ROAD PEACE

In the first chapter of this thesis, it was shown that the advent of cars brought with it the enormous problem of road death. In an effort to secure the future of their product, motordom campaigned to stabilize the perception that cars belong on the roads. As a result, cars became commonplace on the roads and the danger brought by them became normalized. Bicycles, which have belonged on the roads for longer, now have to get along with the new danger imposed on them. In the second chapter, it was shown how the conflicting relationship between bicycles and motor vehicles have been dealt with by Canadian courts in tort cases. Due to misconceptions regarding the dynamics of the bicycle and the misplacement of it with rules originally made for cars, cyclists have regularly been denied proper compensation for their losses.

As the second chapter shows, it is possible to go over each case and discuss what each party should have done. However, even after concluding who is at fault in every single situation in traffic, Canadian tort law fails to address the fact that road deaths as a highly relevant social problem are a creation of modern motor vehicles. There is an inherent danger in automobiles. Mistakes that pedestrians and cyclists committed harmlessly before the 20th century now result in death or injury. The presence of automobiles changed the level of safety of the streets. Motor vehicles perform their role as dangerous obstacles that require a high level of attention from all road users, with death and heavy injuries as punishment for any error.

An anecdotal situation in Brazil might serve as an example in the discussion on the creation of risk and liabilities. In Minas Gerais, Brazil, a man was angry with neighbours who sat on the sidewalk in front of his house, chatting loudly.[225] In order to discourage them, the man installed barbed wire on the sidewalk. That action is clearly illegal and dangerous. If a pedestrian tripped and fell on the wire, that man would certainly be held liable for the damages. But what if law authorized that installation? What if law, authorizing barbed wire in the sidewalk, demanded that pedestrians watch out for barbed wire? Who, then, would be liable if a pedestrian tripped and fell on the wire? It was not the man's fault that the pedestrian tripped and fell. He did nothing illegal. Nevertheless, the wire installed by the man caused much bigger harm to the pedestrian than the sidewalk's concrete would.

In the context of this thesis, automobiles act as the legally sanctioned barbed wire in that automobiles are not illegal. However, when cyclists, due their own mistake, fall on the road and are run over by a motorist, the extent of the injury is increased by the presence for the automobile. This means that, whenever someone chooses their means of transportation, they are selecting the amount of danger that they will impose on other traffic users. Even when using the automobile is necessary due to the circumstances, the very fact of using it imposes a risk to other people on the road.

A solution for addressing losses on the roads more fairly has been found long ago in Europe. As will be shown in this chapter, Germany uses the concept of risk of the

[225] "Homem Cerca Calçada com Arame Farpado e Provoca Indignação em Vizinhos" [Man Fences Sidewalk with Barbed Wire and Causes Indignation to Neighbors] (30 September 2014), online: *R7* <https://noticias.r7.com/minas-gerais/fotos/homem-cerca-calcada-com-arame-farpado-e-provoca-indignacao-em-vizinhos-30092014>.

operation of the machine in order to impose strict liability on the keeper of the automobile.[226] An insurance system change protecting pedestrians and cyclists regardless of who is at fault was also tried in the European Union.[227] Common law imposes strict liability when risk toward others is created, however it does not apply to motor traffic. A closer look at the topic is needed in order to assess whether or not it should.

Strict liability vs. negligence

In contrast to the negligence regime, strict liability is referred to as "liability without fault."[228] The definition of who pays for the damage is based on the relationship of the parties, regardless of who was at fault.[229] In common law, the regime of strict liability is rooted in *Rylands v Fletcher*, in which a landowner was held liable for the damages caused when his reservoir flooded the plaintiff's mine.[230] The essence of the strict liability rule was found in Lord Cranworth's words: "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."[231]

The question of which tort system is more adequate – strict liability or negligence – has long been a source of academic debate.[232] In fact, common law does not have a

[226] Jörg Fedtke, "Strict Liability for Car Drivers in Accidents Involving 'Bicycle Guerrillas'? Some Comments on the Proposed Fifth Motor Directive of the European Commission" (2003) 51:4 Am J Comp L 941 at 949.
[227] Fedtke, *supra* note 226.
[228] Linden, Klar & Feldthusen, *supra* note 118 at 619.
[229] James R Chelius, "Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems" (1976) 5:2 J Leg Stud 293 at 294.
[230] *Rylands v Fletcher*, (1868) LR 3 HL 330.
[231] *Rylands v Fletcher*, *supra* note 230.
[232] Richard A Epstein, "A Theory of Strict Liability" (1973) 2 J Leg Stud 151; Richard A Epstein, "Toward a General Theory of Tort Law: Strict Liability in Context" (2010) 3 J Tort L [ii]; Steven Shavell, "Strict Liability Versus Negligence" (1980) 9 J Leg Stud 1; Richard A Posner, "Strict Liability: A Comment" (1973) 2 J Leg

single principle of liability.[233] Negligence has prevailed in the majority of cases since the nineteenth century,[234] becoming the most important field of tort law.[235] The system of strict liability, however, still exists parallel to it. It is applied to some specific cases either by force of a precedent common law case, such as in *Ryland v Fletcher*, or by statute, such as the workers' compensation laws in several jurisdictions.[236]

The tendency of common law towards negligence becomes apparent in *Bolton v Stone*.[237] In this case, during a cricket match, a ball hit by a player went above the 7-foot fence, injuring a passerby. The House of Lords held that the owners of the field were not negligent, even considering that the possibility of a ball being hit towards the road was foreseeable. When this case is compared to *Rylands v Fletcher*, it can be seen that common law does not have a clear definition on when to use negligence and when to use strict liability. After all, the cricket match organizers were managing their own affairs and injured, however innocently, another person. If Lord Cranworth's lessons in *Rylands v Fletcher* were followed, strict liability should have been applied. However, it was not.

A strong advocate for the regime of strict liability, Richard E. Epstein, explains that the reasoning of the system is to make defendants pay for the damages caused by their actions, since the same actions create gains for them:

Stud 205; Richard A Posner, *Economic analysis of law*, 8th ed, Aspen casebook series (New York: Aspen, 2011) at 213–272.

[233] Andre Tunc, "A Codified Law of Tort - The French Experience" (1978) 39 La L Rev 1051 at 1056.

[234] Epstein, *supra* note 232 at 152.

[235] Linden, Klar & Feldthusen, *supra* note 118 at 173.

[236] Such as Canada, United States and France. Kenneth D Cooper-Stephenson, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Thomson Reuters, 2018) at 19; Jean-Sebastien Borghetti, "Extra-Strict Liability for Traffic Accidents in France" (2018) 53 Wake Forest L Rev 265 at 268–269; Chelius, *supra* note 229 at 298.

[237] *Bolton v Stone*, [1951] AC 850 (UKHL).

> The defendant, as a purposive agent, seeks to internalize all the gains from his action, so that it is only just and proper that he be required to bear their costs. Even if the defendant's potential losses are unknown and undisclosed to him, they are presumptively-remember that all we know at this stage is that the defendant has hurt the plaintiff-equally unknown and undisclosed to the plaintiff. Affirmative defenses, like running into the defendant's right of way, introduce further causal complications, but they do not alter the balance at the close of the prima facie case. To say that simply killing another person does not create liability is, in effect, to say that the defendant is no worse for having killed the plaintiff than if he had not done anything at all. The "innocent" killing is treated for legal purposes as though it were an Act of God. At this point, the supposed moral superiority of the negligence theory becomes suspect. The line between killing and not killing seems a lot more durable and powerful than the line between killing and killing negligently, where the former is not actionable even though the latter is.[238]

Epstein's use of an extreme situation – that of the killing of a person – is proper for this thesis. In the first years of the advent of the automobile, people generally blamed drivers for road deaths. Decades later, the blame for road deaths would also be directed to other factors, since motor vehicles were deemed to belong on the roads. Although automobiles transformed road deaths into a relevant social problem, the dangers in driving them is now often ignored. As a result, victims of motor vehicle drivers may end up with no compensation at all, as in *Ormiston,* in which a cyclist was held to be "the sole author of his misfortune."[239] As Epstein explains, the fact that the driver hit the cyclist is legally treated as if they had not done anything at all.

Richard A. Posner believes that, in terms of safety, strict liability and negligence produce the same effects.[240] However, while he singles out the economic differences between both systems, Posner uses the automobile as an example, pointing that "[o]ne

[238] Epstein, *supra* note 232 at 13–14.
[239] *Ormiston*, *supra* note 171.
[240] Richard A Posner, *supra* note 232 at 226.

way to avoid an auto accident is to drive more carefully, but another is to drive less."[241] Since courts do not consider the amount of driving when they analyze the presence of negligence, strict liability tends to be more effective for that matter. However, Posner opposes a universal rule of strict liability, since it fails to induce victims to change their activity level, which is another form of reducing risk.[242] For the object of this thesis, that is not a problem at all, since law does not intend to reduce the amount of cycling.

Posner also points out that "strict liability operates to insure victims of unavoidable accidents."[243] Whether traffic fatalities are unavoidable is debatable, since urban design and traffic policies have proven to reduce the number of road deaths dramatically.[244] However, while these conditions are not perfectly set in Canada, road deaths and heavy injuries are certainly going to happen. Strict liability, therefore, would serve to "insure," in Posner words, victims of traffic violence.

Steven Shavell makes two types of divisions to analyze tort cases and decide which system is more appropriate. First, Shavell distinguishes *unilateral* from *bilateral accidents*.[245] In *unilateral* cases, the actions of the injurer affect the probability or severity of losses, while in *bilateral* cases the actions of the victim must also be considered.[246] Second, there is a distinction of *accidents between strangers*, *accidents between sellers and strangers*, and *accidents between sellers and costumers–or*

[241] *Ibid*.
[242] *Ibid* at 228.
[243] *Ibid* at 229.
[244] The Swedish approach to traffic safety, called Vision Zero, intends to achieve zero road deaths and heavy injuries by 2020. Within that goal, a target of less than 600 fatalities was decided for 2000. This target was later reduced to 400, which was achieved in 1994. John Whitelegg & Gary Haq, *Vision Zero: Adopting a Target of Zero for Road Traffic Fatalities and Serious Injuries* (Stockholm: Stockholm Environment Institute, 2006) at 7.
[245] Shavell, *supra* note 232.
[246] *Ibid* at 1.

employers.[247] Automobile-pedestrian collisions are dealt with in the category of *accidents between strangers,* both as *unilateral* and *bilateral*. They may be *unilateral* because some collisions are caused solely by the driver's conduct. In *bilateral* cases, the victim's conduct also causes the collision.

It is interesting to note that Shavell does not consider cases in which only the pedestrian caused the incident. It is not explicitly explained in the article, however the reason may be found implicitly when the author refers to the amount of miles a driver chooses to drive as a factor to be considered: in order for an automobile-pedestrian collision to occur, the driver must have made the decision to drive, which in itself represents a risk. Although this causes the impression that the author perceives the danger of the automobile, the article proves that false when it also refers to the number of miles walked by a pedestrian as a producer of risk.

Under a regime of negligence in unilateral cases, Shavell considers that drivers tend to exercise due care, since that is the standard required for them not to be held liable.[248] However, since they are not liable as long as they exercise due care, drivers "will not take into account that going more miles will mean a higher expected number of accidents."[249] The amount of risk imposed to others will not matter, as long as the driver follows the rules. A different situation is found if a regime of strict liability is put in place. Drivers, knowing that they will be held liable regardless of fault, will take the risk into account before deciding whether to drive or not.

[247] *Ibid* at 2–9.
[248] *Ibid* at 2.
[249] *Ibid*.

In bilateral cases, the contributing factor of the pedestrian's behaviour is considered. Under the regime of negligence, pedestrians tend to exercise due care, since they may be held liable.[250] If the regime of strict liability is considered, however, pedestrians will "exercise due care but will walk too many miles," according to Shavell.[251]

The topic of automobility is not central to Shavell. It is actually only referred to as an illustration to his theory. It is natural, therefore, that deep research on the risks imposed by each means of transportation is not made. In his example, Shavell fails to consider that pedestrians used to walk many miles before the advent of the automobile without considerable risk of being killed by a driver. It was in the first years of the automobile that road fatalities started to become a relevant public concern. Walking many miles, therefore, is not the problem. Consequently, that leaves the regime of strict liability with no failures, at least in theory. There will be an incentive for people to drive less, and people may walk as much as they desire. Since Shavell's conclusion is that "strict liability is preferable if it is more desirable to control injurer's activity than victims,'"[252] it can be easily said that, to protect pedestrians, strict liability for motorized vehicle drivers is preferable.

However, these considerations are solely theoretical, since common law has no experience in adopting strict liability in road collisions. Common law has invariably decided that traffic torts are to be resolved through negligence. It is interesting to note

[250] *Ibid* at 7.
[251] *Ibid*.
[252] *Ibid* at 24.

that this interpretation of the law, although accepted and applied, was not always considered fair for the victim. In *Hunter v Wright* (1938), Justice Goddard said:

> A gentleman on his lawful occasions, on Sunday morning, on the footpath is struck from behind, run down, and grievously injured. However, according to the view of the judge, and in the view of this court, he cannot recover damages. The late Swift, J., who, at the time of his lamented death, had an unrivalled experience of these cases, said, on more than one occasion, using the vigorous language which characterised him, that, if Parliament allowed such potentially dangerous things as motor cars to run on the public streets, it ought also to provide that people who were injured by them through no fault of their own should receive compensation, though not necessarily compensation from the driver if the driver has been guilty of no negligence.[253]

For Goddard, the injury to the victim was "shocking", however it would be equally shocking to consider the driver as the one who caused the incident when she had done "nothing blameworthy at all."[254] The victim ended up with no compensation at all. The unfairness of the victim's situation, however, was at least noted in this 1938 case. Fast-forward to 2014, the contrast becomes evident with Justice Lowry's decision stating that the victim, who fell down a rocky embankment while cycling after having his life threatened by a risky move of a motorist, was "the sole author of his misfortune" for having done a "foolish thing."[255]

Although not related to traffic issues, a practical example of the implementation of the regime of strict liability is the workers' compensation system in the United States, which secured that all victims of work-related accidents would receive compensation regardless of fault. Interestingly, there is a historical relation between industrial safety and traffic safety in North America. Due to the new implementation of workers'

[253] *Hunter v Wright*, [1938] 2 All ER 621 at 624.
[254] *Hunter v Wright*, *supra* note 253 at 625.
[255] *Ormiston*, *supra* note 171.

compensation laws beginning in 1911, industries and insurance companies started developing professional strategies to avoid industrial accidents, sparking the creation of the National Safety Council (NSC).[256] The NSC and its local affiliates soon started to address the issue of traffic safety. However, since the negligence regime used in traffic casualties did not create enough concern in industries to address the problem, traffic safety campaigns were not as professional as the industrial safety ones were, and were largely produced by citizen members of local safety councils.[257]

The strict liability system in the workers' compensation laws had a positive social impact in encouraging industries to promote and advertise safety measures. Research also indicates that the system was successful in diminishing the number of industrial accidents.[258] According to a comprehensive study made by James R. Chelius, "the liability system change which occurred when the employer's traditional common law defenses were modified or eliminated was associated with a relative decline in the non-motor vehicle machine death."[259]

Even though workers' compensation laws are an example of strict liability allocating the costs of accidents into the creation of the risk, it is important to assert that the dynamics of industrial accidents are different from that of traffic collisions. In order to understand how a strict liability system for motor occurrences in traffic would work, it is necessary to look at jurisdictions in which it has been applied.

[256] Norton, *supra* note 46 at 32.
[257] *Ibid* at 33–37.
[258] Chelius, *supra* note 229.
[259] *Ibid* at 306.

Strict liability for car drivers or owners in France and Germany

Several jurisdictions in Europe impose some form of strict liability to car drivers or owners in contrast to the regular negligence system used in Canada.[260] Since they differ from one another, an analysis of some countries' approach to the topic will be important to inform the best solution for Ontario.

France

Before 1985, tort law on road incidents in France were regulated by the general tort provisions in articles 1382 et seq. at the time, now in articles 1240 et seq.[261] While articles 1382 and 1383 clearly state the element of fault, article 1384 does not.

> Art. 1382
> Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.
> Art. 1383
> Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.
> Art. 1384
> A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.[262]

Due to the apparent contradiction of article 1384, which does not require the element of fault, to the previous articles 1382 and 1383, which do require this element, the prevalent interpretation was that article 1384 was an introduction to its own

[260] Basil S Markesinis, *The German Law of Torts: A Comparative Treatise*, 4th ed (Oxford: Hart, 2002) at 724.
[261] The Civil Code changed in 2016. Article 1382, for example, is now article 1240. The content of the articles referred to in this thesis, however, remain unchanged. Ruth Redmond-Cooper, "The Relevance of Fault in Determining Liability for Road Accidents: The French Experience" (1989) 38:3 ICLQ 502 at 502; Borghetti, *supra* note 236 at 266.
[262] Art 1382-1240 Civil Code (France) [translated by Georges Rouhette], online: <https://www.legifrance.gouv.fr/content/download/1950/13681/version/3/>.

paragraphs and to its following articles,[263] which do not require the element of fault. With the high number of industrial accidents following the industrial revolution, French courts broadened the scope of article 1384, applying it in cases of employees being harmed by industrial machinery.[264] The courts, therefore, denied that the phrase "things which are in his custody" referred only to animals and buildings. The courts' interpretation, however, presumed the existence of fault.[265] Because of that, employers could defend themselves by proving that they were not negligent.[266] In response to this interpretation, French lawmakers passed a workers' compensation act, according to which fault was not a necessary element for employees to gain compensation for industrial accident losses.[267]

During the 20th century, the courts' interpretation on article 1384 evolved towards determining compensation without proof of fault:[268] defendants should be held liable for damages caused by things in their custody with no chance of providing the absence of negligence as a defence. The debate now was whether article 1384 was also applied in cases in which the object was mishandled or only in cases of defective objects.[269] If the latter is true, damages caused by the mishandling of objects would fall into article 1382, which demands proof of fault. This debate was extremely important for cases of automobile incidents. Suggesting that article 1384 only applies in cases of defective

[263] Redmond-Cooper, *supra* note 261 at 503. The paragraphs of article 1384 concern acts of employees and apprentices. The articles following article 1384 correspond to tort relating to possessing animals (article 1385), defective buildings (article 1386).
[264] M A Millner, "Autonomous Acts of Things in Quebec Law--Legal Adventurism Versus Legal Conservatism" (1971) 17 McGill LJ 699 at 702.
[265] Redmond-Cooper, *supra* note 261 at 503.
[266] *Ibid*.
[267] *Ibid*.
[268] *Ibid*.
[269] *Ibid*.

objects would mean that pedestrians and cyclists hit by motorists would need to provide evidence of negligence, unless the incident was caused by a defect in the vehicle.

The matter was decided in the *Jand'heur* case, with the Cour de Cassation holding that the absence of negligence could not be used as a defence against liability based on article 1384.[270] According to the decision, a motor vehicle is inherently dangerous, requiring special attention from its owner.[271] However, two following decisions would make the matter more confusing. In *Desmares*, two pedestrians were hit by a car while they were crossing a road.[272] The courts could not determine whether they were on the crosswalk. Nonetheless, the second civil chamber of the Cour the Cassation held the driver fully liable, considering that contributory negligence was not a possible defence under article 1384.[273] In contrast to this decision, in *Derguini v Tidu*, a five-year-old girl was held contributorily negligent when she was hit and killed while crossing a road on a crosswalk.[274] Her contributory negligence came from the fact that she ran, panicked by the approach of a vehicle, which made it impossible for the motor vehicle driver to avoid the collision. The difference from *Desmares* was that, in *Derguini*, the case was brought as an adjunct of a criminal proceeding for the crime of manslaughter.[275] In this situation, the case had to be decided under article 1382, therefore based on fault and allowing the defence of contributory negligence.[276]

[270] Millner, *supra* note 264 at 703.
[271] Redmond-Cooper, *supra* note 261 at 504.
[272] *Ibid* at 506.
[273] *Ibid*.
[274] *Ibid* at 507.
[275] *Ibid*.
[276] *Ibid* at 506–507.

It was in this scenario of confusion that *loi du 5 juillet 1985 (loi Badinter)* was enacted, having passed unanimously through the French Parliament.[277] The new law considers the driver or keeper of a motorized vehicle strictly liable for losses derived from road incidents.[278] The main objective of the law is that every road violence victim receives compensation for their losses.[279] For that reason, there is no defence for natural events or acts of a third party.[280]

The strict liability system does not apply when the victim is the driver, as a result of a demand from the insurance industry, which claimed that premiums would increase significantly otherwise.[281] With this exception, the law cannot fulfill its goal of assuring compensation for every road victim. Another factor that takes the law further away from this objective is the possibility of denying the victim any compensation if it was proven that the incident occurred exclusively due to the victim's "inexcusable fault," making possible the defence of contributory negligence.[282] This was another compromise in order to make it possible for the law to pass through Parliament.[283] There are, however, limitations for this exception. If the victim is less than 16 years old, more than 70 years old or at least 80% incapacitated, only intentional contributions may be alleged as contributory negligence.[284] Also, there is no partial compensation: if the fault of the

[277] Andre Tunc, "The Loi Badinter" (1996) 3 MJECL 329 at 329.
[278] Fedtke, *supra* note 226 at 943.
[279] Tunc, *supra* note 277 at 330.
[280] Art 2 Loi n° 85-677 du 5 juillet 1985 (France).
[281] Tunc, *supra* note 277 at 330.
[282] Art 3 Loi n° 85-677 du 5 juillet 1985 (France).
[283] Tunc, *supra* note 277 at 330.
[284] Art 3 Loi n° 85-677 du 5 juillet 1985 (France).

victim is found not to be the exclusive cause for the incident, the victim will receive full compensation.[285]

This innovation did not pass smoothly through the courts. At first, judges interpreted the scope of the term "inexcusable fault" broadly in order to apply contributory negligence. The simple act of stepping inadvertently off the sidewalk, for example, was considered an inexcusable fault.[286] However, when the cases got to the *Cour de Cassation*, the definition of "inexcusable fault" was considerably narrowed, resulting in the reform of 10 out of 11 cases in one afternoon.[287] Following the *Cour de Cassation*'s interpretation, inexcusable fault only happens in case of "a voluntarily fault of an exceptional seriousness which exposes without any reason the person who commits it to a danger of which he ought to have been aware."[288]

The law also broadens the possibility of the victim receiving compensation by considering liable every driver or owner whose vehicle is "involved" in the incident.[289] If there's an incident with many vehicles involved, victims may claim damages from any of the vehicles' drivers or owners, no matter which car actually hit each victim specifically.

The results of the law are deemed positive. Andre Tunc, a strong advocate of the system, said in 1996 that "no one, today, advocates for the repeal of the *loi Badinter.*"[290] The behaviour of road users was not worsened by the law.[291] Insurance premiums

[285] Borghetti, *supra* note 236 at 280.
[286] Tunc, *supra* note 277 at 335.
[287] *Ibid*.
[288] Borghetti, *supra* note 236 at 280.
[289] *Ibid* at 276.
[290] Tunc, *supra* note 277 at 339.
[291] *Ibid* at 337.

increased at a lesser rate than the cost of living.[292] The delay to receive compensation was reduced.[293] Cases going to courts dropped from 27% to 10%,[294] particularly since fault of either the victim or the driver were not an issue in 90% of traffic incidents.[295] The French liability approach to road violence remains an inspiration for other jurisdictions.

Germany

German tort law is generally based on fault, a tradition that dates back to pre-codification times.[296] It was in the second half of the nineteenth century that risk liability (*Gefährdungshaftung*) was introduced to German law through specific statutes. Despite those statutes, the German Civil Code (*Bürgerliches GesetzBuch*, BGB), passed in 1896, has based German tort law strongly on fault, leaving strict liability to be regulated by statutes.[297] In contrast to some other legal systems, strict liability in Germany has a tradition to be applied solely by the legislature.[298] For this reason, German judges never had the chance to apply the French interpretation regarding cases of road violence that existed even before the enactment of the *loi Badinter*.

Strict liability rules developed alongside German industries.[299] New technologies brought new and increased dangers that needed to be addressed. Industrial activities were encouraged, however it was understood that these activities should be "saddled with the cost of the risks they entailed."[300] Following this mindset, a resolution was passed at a

[292] *Ibid*.
[293] *Ibid* at 338.
[294] *Ibid*.
[295] Fedtke, *supra* note 226 at 944.
[296] Markesinis, *supra* note 260 at 714.
[297] *Ibid*.
[298] *Ibid* at 715.
[299] *Ibid* at 716.
[300] *Ibid*.

conference of lawyers demanding the Imperial Insurance Act be expanded to motorized vehicles.[301] The debate entered Parliament, which enacted the Motor Vehicle Act in 1909, not including, however, any insurance system.[302] This Act became the Road Traffic Act in 1952. It is interesting to note that the conference that originated the debate happened in 1902, when the number of cars in Germany were incomparably lower than today.[303] This means that the number of road deaths were still to increase considerably in the following years.[304] At the same time, however, it means that road deaths were not as accepted as they became after the stabilization of the notion that cars belong to the road.

According to the German Road Traffic Act, the registered keeper (*Halter*) of an automobile is strictly liable for personal injury, death, and property damages caused to others due the operation of the vehicle.[305] The keeper is the person who has control over the use of the vehicle, who may not necessarily be the owner.[306]

As the law was created in response to the increase in road violence which followed the advent of the fast and heavy automobile, the Road Traffic Act's strict liability regime does not apply for vehicles that travel at less than 20km/h.[307] Basil S. Markesinis opposes this limitation, arguing that, "given the evidence that we now have

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[301] *Ibid* at 730.
[302] *Ibid*.
[303] Markesinis cites 2000 cars in 1902, while Gert Brüggemeier mentions that the first official count was in 1907, when there were 10.000 "personal cars." In either case, the number is far away from 2016's 45.803.560 passenger cars. *Ibid*; Gert Brüggemeier, "Industrialisation, Risks and Strict Liability: The Diverse Paths of German and US Law" (2015) Opinio Juris in Comparatione at 9; "Passenger cars in the EU - Statistics Explained", online: *European Commission* <http://ec.europa.eu/eurostat/statistics-explained/index.php/Passenger_cars_in_the_EU>.
[304] From 1907 to 1912, road deaths increased by 204.8%, from 145 to 442. Frederick S Crum, "Street Traffic Accidents" (1913) 13:103 Publications of the American Statistical Association 473 at 480.
[305] Jonathan Hill, "Comparative Law, Law Reform and Legal Theory Review Article" (1989) 9 Oxford J Leg Stud 101 at 108; Markesinis, *supra* note 260 at 733.
[306] Markesinis, *supra* note 260 at 733.
[307] § 8 Road Traffic Act (Germany).

that most lethal traffic accidents occur at speeds of under 30mph, this provision of the statute seems of dubious validity."[308] More thought should be given to this opinion. First of all, Markesinis does not cite the source of this information. Second, 30mph is much faster than 20hm/h, making the alleged data of incidents occurring under 30mph insufficient to evaluate this norm. Third, even at low speeds, motor vehicles that have the power to travel at faster speeds tend to create more risks due to acceleration power. A person running at 12km/h takes longer to get to that speed, while a car gets there quickly, enhancing its unpredictability. This means that a vehicle that has the power to run faster can be more dangerous, even in lower speeds. These nuances have to be kept in mind in order for the elements that make automobiles dangerous to be understood.[309]

The German legislator decided to leave pain and suffering out of the scope of the Road Traffic Act.[310] These sorts of damages, however, can be recovered through the general fault rule of the German Civil Code. Another limitation imposed to the strict liability regime is the maximum compensation amount. The plaintiffs cannot recover more than five million euros through the Road Traffic Act.[311] If the event happened due to the use of highly or fully automated vehicle, this maximum compensation is increased to ten million euros.[312] Defendants can allege *force majeure* as a defence.[313] Contributory negligence is another possible defence, which makes it possible for the compensation to

[308] Markesinis, *supra* note 260 at 733.
[309] This is especially important for the regulation of pedal assisted bicycles, which, although motorized, are less dangerous than motorcycles. Celso Minoru Sakuraba Junior, "O Enquadramento Legal das Pedelecs" [The Pedelecs Legal Framework] in *A cidade em equilíbrio* (Curitiba: Proec/UFPR, 2014) 277.
[310] Hill, *supra* note 305 at 109.
[311] §12 Road Traffic Act (Germany).
[312] §12 Road Traffic Act (Germany).
[313] Hill, *supra* note 305 at 108.

be reduced.[314] Even though the German strict liability system protects the victim better than the common law negligence system used in Canada, the fact that the legislator left pain and suffering and values that exceed the maximum compensation amount out of the scope of the Road Traffic Act suggest an unreasonable fear of creating excessive burden to vehicle owners and insurance companies. In Markesinis' view:

> If these "limitations" imposed by the statutes were dictated by fears of unlimited liability and unbearable economic consequences, especially at a time when insurance was not as widely spread as it is today, then the time has surely come to reconsider the validity of this kind of argument. Certainly, the absence of any maxima in compensation paid under the Water Act has caused no problems. In motor vehicle insurance, coverage in excess of the maximum amount provided by the statute (i.e. DM 750,000) is widely obtained without a considerable increase in premium cost. Finally, the Swiss experience, quite different in this respect from the German, has not justified the fears expresses in Germany concerning an extension of the rules of strict liability.[315]

The fact that the German system is criticized for not fully protecting victims of road violence speaks even louder about the negligence system used in Canada. Germany and France have been mostly successful in protecting victims with the strict liability system, with no negative consequences for the sustainability of insurance companies.

Insurance systems

It is impossible to talk about compensation systems for road violence damages without mentioning insurance systems. Both in France and in Germany, insurance law plays an important role to assure that the victims are compensated for their losses. Quebec's insurance law also does an important job protecting victims of road violence by

[314] *Ibid*.
[315] Markesinis, *supra* note 260 at 724.

assuring compensation for everyone regardless of fault. In Ontario, victims who are not protected by tort law are also not protected by insurance law. In other words, if a victim is held fully liable for their losses, the car owner's insurance contract does not obligate the insurance company to compensate the victim.

Naturally, if the victim has their own insurance, they will be compensated under that. Although insurance for pedestrians and cyclists is rare, people who contract insurance as drivers are entitled to claim damages against their insurance companies if they are struck by a motor vehicle while walking or cycling. This is a consequence of section 5.2.1 of the Ontario Automobile Policy, a document that contains the standard automobile insurance conditions in the province, which states:

> We will pay any amounts you or other insured persons have a legal right to recover as damages from the owner or driver of an uninsured or unidentified automobile for bodily injury resulting from an accident involving an automobile, up to the limits in this Section.[316]

Ontario and Quebec's "no-fault" insurance systems are important for this thesis, since they work similarly to a strict liability system in the sense that the victim is compensated without any debate regarding fault. Posner refers to this type of system as "no liability," since it does not involve tort.[317] In Ontario, however, damages to third parties, although covered by automobile insurances, are not included in the no-fault system. As a consequence, drivers receive automatic compensation if they are hurt, but pedestrians and cyclists hit by a motorist have to rely on the tort system.

[316] Ontario Automobile Policy, s 5.2.1.
[317] Posner, *supra* note 232 at 212.

Insurance for third-part liability in France

Apart from the *loi Badinter*'s tort regulation, French legislation also relies on third party insurance, public compensation fund and social security to protect victims of road violence. Third party insurance is regulated by the French insurance code, which requires anyone who may be liable for damages in which a motor vehicle is involved to contract insurance.[318]

The third party insurance required by law covers damages caused by anyone who uses the vehicle, even if they were not authorized, except if the driver is a professional involved in repairing, selling and inspecting.[319] If the use of the car was not authorized, the insurance company is entitled to receive compensation against the person liable for the damages paid to the insured person.[320] Damages to passengers of the vehicle are also covered by the mandatory insurance.[321] If the vehicle is stolen, perpetrators, co-perpetrators and accomplices are not covered.[322] The third party must claim compensation against the insurance company, instead of the driver or the owner of the vehicle.[323] If there is no dispute regarding liability and amount of damages, the insurer must offer compensation within three months from the incident.[324] If there is a dispute, it must present a response within this same period.[325] In case of physical injury, an offer of compensation must be made within eight months.[326] This compensation procedure is deemed to have successfully discouraged litigation: in 1985, there were 30,394 claims out

[318] Art L 211-1 Insurance Code (France).
[319] Art L 211-1 Insurance Code (France).
[320] Art L 211-1 Insurance Code (France).
[321] Art L 211-1 Insurance Code (France).
[322] Art L 211-1 Insurance Code (France).
[323] Borghetti, *supra* note 236 at 284.
[324] Art L 211-9 Insurance Code (France).
[325] Art L 211-9 Insurance Code (France).
[326] Art L 211-9 Insurance Code (France).

of 191,132 traffic incidents, while in 2010 there were 8206 claims out of 67,288 traffic incidents.[327]

The insurance contract cannot limit the amount of damages related to personal injury to be insured.[328] This limitation is possible in case of property damages, however it cannot be set at an amount inferior to that which is decided by the government as the minimum.[329] Two other possibilities of limitation are the case of the motorist not having a driver's licence and the case of people being carried in the automobile without following safety requirements.[330] In these situations, however, the victim can still claim for damages against the insurance company, which in turn has a right of recourse against the person insured.[331]

Although the French insurance regime is fairly broad in its scope to protect the victim of road violence, there are still cases in which the victim may be found unprotected by insurance law. The person liable for the incident might be unknown or uninsured, or the insurance company may be insolvent. In these cases, there is a guarantee fund of compulsory damage insurances (*fonds de garantie des assurances obligatoires de dommage*), against which the victim may claim compensation.[332]

The French insurance rules for third party liability might not differ much from their equivalent in other jurisdictions. In Ontario, for example, insurance for third party liability is also mandatory. However, it is its combination with the strict liability regime

[327] Borghetti, *supra* note 236 at 288–289.
[328] *Ibid* at 284.
[329] *Ibid*.
[330] Art R 211-10 Insurance Code (France).
[331] Borghetti, *supra* note 236 at 284.
[332] Art L 241-1 Insurance Code (France).

that makes sure all victims of road violence are compensated for their losses. Tort law assures that victims do not need to discuss fault to receive compensation, and insurance law assures that the financial amount they are entitled to effectively exists and is received within a reasonable time.

Insurance for third-part liability in Germany

In Germany, third party liability insurance became mandatory in 1939, through the Obligatory Insurance Act.[333] In 1965, the Act, known as *Pflichtversicherungsgesetz*, was reformed in order to comply with the European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles.[334] The new law was intended to broaden the scope of protection to road violence victims in situations of uninsured vehicles and hit-and-run cases.[335] In 1968, the Aid for Traffic Victims Fund (*Verkehrsopferhilfe*) was created in order to protect victims when the insurer is insolvent.

According to German law, a keeper of an automobile must carry insurance for himself and for the driver of the vehicle.[336] The minimum coverage has to include the maximum amount of damages that the keeper or the driver may be strictly liable for according to the Road Traffic Act.[337] In Germany, a valid certificate of insurance is a requirement for obtaining a licence to operate a motor vehicle.[338] It is a criminal offence to drive an automobile without abiding to this obligation.[339]

[333] Markesinis, *supra* note 260 at 731.
[334] *Ibid*.
[335] *Ibid*.
[336] *Ibid*.
[337] *Ibid* at 719.
[338] *Ibid* at 731.
[339] *Ibid* at 731–732.

The victim has a direct right of action against the insurer.[340] The insurance policy protects the victim until after its cancellation, however the claim must be put in place within one month after the cancellation is notified to the licensing authority.[341] The insurer is also liable if the driver is a person not authorized to use the vehicle by its keeper.[342] While in this situation the keeper is not liable, nevertheless insurance law obliges the insurance company to compensate for damages in order to secure the protection of the victim. This last rule was not in the original Obligatory Insurance Act, but was added in the 1969 reform.[343]

As it can be seen, the German insurance system is relatively similar to its French counterpart, seeking to avoid leaving road violence victims unprotected. The minimum insured amount for personal damages is not unlimited in German law, however it works within the logic of the system of the Road Traffic Act, which delimits a maximum amount of damages to be compensated under this act.

In fact, in order for the German law to secure protection for road violence victims, both tort law and insurance law must work in tune. While tort law frees the victim from the discussion over fault, the scope of the German insurance system, as Markesinis puts it, "is to protect the injured but at the same time to spread the risk of this immensely useful but also highly dangerous activity to the whole community of those carrying the activity."[344]

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[340] *Ibid* at 732.
[341] *Ibid*.
[342] *Ibid*.
[343] *Ibid*.
[344] *Ibid*.

No-fault first-party insurance in Ontario

Ontario's Compulsory Automobile Insurance Act obliges owners and lessees of a motor vehicle to contract automobile insurance.[345] Third-party liability is included in this obligation, at a minimum amount of $200,000.[346] However, it is interesting to study, for the purposes of this thesis, the provincial no-fault liability system for first-party damages arising from automobile incidents. The no-fault scheme resembles a strict liability system as it eliminates discussion over fault; nonetheless, it is considered to be a no-liability system, since the whole system is regulated by insurance law, with no discussion over tort law at all.[347]

The first no-fault scheme for automobile insurance in the English-speaking world was introduced in Saskatchewan in 1946.[348] The system spread throughout Canada in different manners. In Saskatchewan, it is possible to choose between a no-fault coverage or compensation through the tort system with less no-fault benefits.[349] Manitoba and Quebec are considered to have a "pure" no-fault system, because there is no civil right of action for damages.[350] In Ontario, its first form was created in 1969.[351] It was offered on a voluntary basis, coexisting, therefore, with the option for the traditional tort system.[352] In 1972, medical and rehabilitation expenses were introduced to the system,[353] which

[345] RSO 1990, c C.25, s 2(1).
[346] RSO 1990, c I.8, s 239(1)(b) and 251(1).
[347] Posner, *supra* note 232 at 212.
[348] Kenneth D Cooper-Stephenson, *supra* note 236 at 20.
[349] *Ibid*.
[350] *Ibid*.
[351] Stephen E Firestone, *Ontario Motor Vehicle Insurance Law & Commentary*, 2017 ed (Toronto: LexisNexis Canada, 2016) at 1; James M Flaherty & Catherine H Zingg, "History Leading to Creation of the Ontario Insurance Commission" in *Financial Services Commission of Ontario (Motor Vehicle Insurance): Law and Practice* (Aurora: Canada Law Book, 1999) at 2.
[352] Stephen E Firestone, *supra* note 351 at 1.
[353] Flaherty & Zingg, *supra* note 351 at 2.

became mandatory in all automobile insurance policies in 1974.[354] However, the right to sue in tort still existed for amounts not covered by the no-fault scheme.[355] Moreover, the fact that the no-fault system was a mandatory component of insurance policies did not mean that insurance was mandatory in order to maintain a motor vehicle. Automobile insurance became mandatory in 1980.[356]

In the mid-80s, debates over an alleged "insurance crisis" arose, with concerns regarding the rise of insurance premiums.[357] James M. Flaherty and Catherine H. Zingg tell of an outcry coming from the insurance world over the so-called "Brampton case,"[358] in which trial damages were held at more than $6 million.[359] The case was referred to in debates regarding automobile insurance, although it consisted of a city liability case in which two cyclists collided with each other.[360] Nonetheless, the case highlighted the defence of a stricter no-fault liability scheme, limiting the scope of unforeseeable tort litigations. As a result, changes in the scheme limited tort law through the creation of a restrictive threshold system in 1990, with the support of the insurance industry-sponsored Insurance Bureau of Canada.[361] Tort law was relegated solely to cases of "permanent serious disfigurement" and "permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature."[362] After 1990,

[354] Stephen E Firestone, *supra* note 351 at 1.
[355] *Ibid*.
[356] *Ibid*.
[357] *Ibid* at 1–2; Flaherty & Zingg, *supra* note 351 at 1–2.
[358] Flaherty & Zingg, *supra* note 351 at 1–2.
[359] McErlean v Sarel, 1987 CanLII 4313 (Ont CA).
[360] Flaherty & Zingg, *supra* note 351 at 1.
[361] *Ibid* at 3.
[362] *Insurance Statute Law Amendment Act,* 1990, SO 1990, c 2, s 57.

several reforms took place in order to improve coverage, reduce assessment costs, reduce costs of first-party benefits, and reduce abusive and fraudulent claims.[363]

The current system protects "the owner of an automobile, the occupants of an automobile and any person present at the incident" from liability "arising directly or indirectly from the use or operation of the automobile."[364] Instead of the tort system, damages are recovered through benefits as provided by the Statutory Accident Benefits Schedule,[365] which establishes the benefit amount for different situations. If the insured "sustains an impairment that is predominantly a minor injury", the medical and rehabilitation benefits must not exceed $3,500.[366] In the case of "catastrophic impairment", the limit is $1 million.[367] In other cases, it is $65,000.[368] The statute also provides amounts regarding income loss and loss of income capacity, which also vary depending on the situation.[369] As an exception, damages regarding health care can be claimed through tort in cases of "permanent serious disfigurement" and "permanent serious impairment of an important physical, mental or psychological function."[370]

The Ontario automobile insurance system has been highly criticized for its complexity. Stephen E. Firestone says that "the area has become highly complex and confusing to all but the most expert in the area."[371] Mary Kelly, Anne Kleffner and Sharon Tennyson argue that the several reforms since 1990 have failed to stabilize the

[363] Mary Kelly, Anne Kleffner & Sharon Tennyson, "Ontario Auto Insurance Reform: A Game of 'Whack-a-Mole'" (2015) 82 Assurances et Gestion des Risques 43 at 47.
[364] *Insurance Act, supra* note 345, s 267.5(1).
[365] O Reg 34/10.
[366] Statutory Accident Benefits Schedule, *supra* note 365, s 18(1).
[367] Statutory Accident Benefits Schedule, *supra* note 365, s 18(3)(b).
[368] Statutory Accident Benefits Schedule, *supra* note 365, s 18(3)(a).
[369] Statutory Accident Benefits Schedule, *supra* note 365, ss 7 to 12.
[370] RSO 1990, c 1.8, s 267.5(3)(a)(b).
[371] Stephen E Firestone, *supra* note 351 at 4.

cost of insurance, especially in the Greater Toronto Area.[372] Specialists have also highlighted, in non-academic publications, the constant rise in premium costs and number of claims.[373] Kenneth D. Cooper-Stephenson alleges that proving that injuries were caused by circumstances that fit within the no-fault system may be difficult.[374] None of the critics, however, demand a return to the tort system.

For the purposes of this thesis, the most important deficiency in the no-fault system is that it does not cover third-party damages. Pedestrians and cyclists, who are threatened by the danger of automobiles on the roads, are less protected by law than those who benefit from motor vehicles. This lack of protection seems to make sense at first glance, from a customer-provider perspective; after all, pedestrians and cyclists generally do not pay for insurance. Nonetheless, law leaves us with a system that provides less protection specifically to the victims of road violence that do not cause road violence.

Naturally, the Ontario Hospital Insurance Plan, which is the provincial public health insurance system, has the capacity of absorbing those victims. However, this means that the costs of road violence are transferred to all taxpayers, instead of allocating those costs to motor vehicle drivers.[375] Even in New Zealand, which has a very comprehensive insurance system covering all sorts of accidents (not only road cases),[376]

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[372] Kelly, Kleffner & Tennyson, *supra* note 363 at 64.
[373] "Ontario Auto Insurance Rates Continue Climb in 2010 Q1" (2010) 77:5 Canadian Underwriter 8; David Gambrill, "Ontario Auto Still Bent Out of Shape" (2012) 79(1) Canadian Underwriter 6.
[374] Kenneth D Cooper-Stephenson, *supra* note 236 at 22.
[375] Jack L Carr, "Giving Motorists a Choice between Fault and No-Fault Insurance: An Economic Critique Tort Law--No Fault Insurance Symposium" (1989) 26 San Diego L Rev 1087 at 1087.
[376] James A Henderson, "The New Zealand Accident Compensation Reform" (1981) 48:3 U Chicago L Rev 781 at 782.

road violence victims' compensation is provided by the Motor Vehicle Compensation Fund.[377] This Fund is financed by taxes on driver's licences and motor vehicles.[378]

Naturally, the reduced protection of road violence victims in Ontario's insurance system is a result of its combination with tort law. Based on negligence, tort law fails to provide compensation to victims of road violence in several cases. For those, insurance law does not come to the rescue. There is, however, insurance in case negligence is proven or presumed. If tort law established a strict liability system, victims would be automatically protected by the insurance system as it is now – until the limits of protection of $200,000 (minimum), which is ridiculously low compared to the equivalent in Germany (five million euros) or in France, which prohibits any limitation to the third party's amount of compensation.

Ontario, therefore, has two options to enhance the protection of victims of road violence. The first is to copy the French and German systems, establishing strict liability in case of damages to pedestrians and cyclists caused by the use of a motor vehicle, in addition to an insurance system that secures the compensation amount, which Ontario already has, although it is limited. The second option is to establish a no-fault insurance system for damages caused to third parties, when those third parties do not have insurance of their own. This would be an extension of the current no-fault system.

The third-party no-fault insurance attempt in Europe

An attempt to secure full protection to victims of road violence through insurance law was made in Europe. A proposal of a Fifth Motor Directive was made by the

[377] Geoffrey W R Palmer, "Compensation for Personal Injury: A Requiem for the Common Law in New Zealand" (1973) 21:1 Am J Comp L 1 at 19.
[378] *Ibid*.

European Commission, including mandatory insurance for damages caused to pedestrians and cyclists with no need to discuss fault. The original proposal intended to add the following article: "The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover personal injuries suffered by pedestrians and cyclists as a consequence of an accident in which a motor vehicle is involved, irrespective whether the driver is at fault."[379]

In England, used to the common law negligence system which, as in Canada, leaves some victims without compensation, the proposal was received with a great deal of anti-cyclist paranoia. The Guardian alerted that "[t]o the delight of cyclists and the dismay of drivers, a European law is being planned to force motorists to pay compensation and damages in all accidents with cyclists."[380] Another column in the same newspaper said that

> The apparent disregard of so-called "guerrilla cyclists" for traffic signals and the highway code has long irritated Britain's drivers and a controversial proposal on motor insurance from the European commission is about to spark a new bout of collective road rage.[381]

A BBC column`s subtitle added that "[b]lameless drivers may be forced to compensate careless cyclists and pedestrians in road accidents, under new EU plans to shake up the UK's insurance market."[382] The press, of course, was not alone in their criticism, with the Comité Européen des Assurances and the European Bureau of the

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[379] *Proposal for a Directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC and Directive 2000/26/EC on insurance against civil liability in respect of the use of motor vehicles (2002/C 227 E/18)*, art. 2.
[380] Joanna Walters & transport editor, "Driver Fury Over Euro Cycle Laws" (4 August 2002), online: *The Observer* <https://www.theguardian.com/uk/2002/aug/04/politics.transport>.
[381] Andrew Osborn, "Two Wheels Good, Four Wheels Bad" (5 August 2002), online: *The Guardian* <https://www.theguardian.com/uk/2002/aug/05/transport.world>.
[382] "Blame It on the Driver", (8 July 2002), online: BBC News <http://news.bbc.co.uk/2/hi/uk/2097872.stm>.

International Alliance of Tourism and International Automobile Federation expressing "concern" over the proposed norm.[383]

The European Commission responded with a press release, stating that most traffic incidents are caused by motor vehicles and that the cost of insurance would not be affected.[384] It concluded the topic by saying:

> The proposal adopted by the Commission in this regard aims to ensure that pedestrians and cyclists are covered by the compulsory insurance of the vehicle involved in the accident. This enhances their protection, as the weakest parties in traffic. This insurance coverage does not prejudge the civil liability which the pedestrian or cyclist may incur, or the level of compensation which is determined by the Member States' national legislation.[385]

The European Commission was caught in a difficult situation on this topic, since civil liability is not part of its competence. For this reason, it made clear, or at least tried to, that the liability system of the member states would remain intact. It failed to explain, however, how a no-fault insurance system would harmonize jurisdictions that rely on negligence in tort law. In the situation of a cyclist being held fully liable for an incident, tort law would conclude that the cyclist should receive no compensation, while insurance law would demand the insurer to compensate the victim. If the cyclist receives the money, it means that tort law is useless in these cases. If the money has to be returned to the insurance company, the no-fault insurance rule has no point in existing.

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[383] "EUR-Lex - 52002PC0244 - EN - EUR-Lex", online: *Access to European Union Law* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2002:0244:FIN>.
[384] European Commission, "Motor Insurance: New Commission Proposal to Modernise European Law (Fifth Motor Insurance Directive) - Frequently Asked Questions", online: *European Union* <http://europa.eu/rapid/press-release_MEMO-02-133_en.htm>.
[385] *Ibid*.

This debate will, at least for now, remain solely in theory, since the idea did not go forward. The proposed Fifth Motor Directive came into force without that norm. Afterwards, the whole Directive was repealed by a new Directive, which did not contain the no-fault rule to protect cyclists and pedestrians.

Ontario, however, does not need to go through such logical struggle to implement a similar no-fault system. Since Parliament has the jurisdiction over both insurance and tort matters, a new law could be enacted establishing the no-fault insurance rule and abolishing tort litigation over the issue, as was done in Quebec.

No-fault insurance system in Quebec

The Quebec automobile insurance system is deemed to be one of the most ambitious and successful no-fault systems.[386] The system came to existence with the *Automobile Insurance Act* in 1978,[387] with the intent to secure compensation for victims of road violence.[388] Victim, for the purpose of the system, is a person who suffers bodily injury.[389] Damages to property are left out of the no-fault rule, having to rely on the fault-based tort system prescribed in articles 108 to 121.[390]

Contrary to the solely first-party no-fault system in Ontario, the Quebec no-fault system applies to third parties as well.[391] Tort claims based on fault is completely

[386] Martine Lelièvre-Boucharat, "Le régime québécois d'indemnisation des victimes d'accidents de la route est-il un exemple à suivre pour le droit français?" (2003) 55:1 RIDC 177 at 181; Jeffrey O'Connell & Charles Tenser, "North America's Most Ambitious No-Fault Law: Quebec's Auto Insurance Act Tort Reform Symposium" (1987) 24 San Diego L Rev 917 at 918.
[387] O'Connell & Tenser, *supra* note 397 at 917.
[388] Marcel Boyer & Georges Dionne, "Description and Analysis of the Quebec Automobile Insurance Plan" (1987) 13:2 Canadian Public Policy / Analyse de Politiques 181 at 182.
[389] CQLR, c A-25, s 6.
[390] *Automobile Insurance Act,* supra note 389, ss 108–121.
[391] *Automobile Insurance Act,* supra note 389, s 6.

abandoned for bodily injury caused by an automobile.[392] Victims receive compensation from the Société de l'assurance automobile du Québec regardless of who was at fault.[393] In order to be entitled to receive the compensation, however, the victim must be resident in Quebec.[394] Non-residents may also be entitled to it, as long as they are not responsible for the incident, which is decided following ordinary rules of law.[395] Interestingly, residents of Quebec can also receive compensation even if the incident occurs outside of Quebec.[396]

The compensation that victims are entitled to are broad, including medical and paramedical care, transportation and lodging, prostheses and orthopedic devices and cleaning, repair and replacement of clothing damaged in the incident.[397] Personal home assistance may be provided through reimbursements that may not exceed $614 per week.[398] Income replacement is also provided for victims who holds an employment on a full-time basis at the time of the incident.[399] Those who are unemployed may also receive income replacement indemnity for 180 days following the incident if they become unable to hold an employment that they could not have due to the incident.[400] For pain and suffering, indemnity in the maximum of $175,000 may be provided.[401] Indemnities to

[392] *Automobile Insurance Act,* supra note 389, s 83.57.
[393] *Automobile Insurance Act,* supra note 389, s 5.
[394] *Automobile Insurance Act,* supra note 389, s 7.
[395] *Automobile Insurance Act,* supra note 389, s 9.
[396] *Automobile Insurance Act,* supra note 389, s 7.
[397] *Automobile Insurance Act,* supra note 389, s 83.2.
[398] *Automobile Insurance Act,* supra note 389, s 79.
[399] *Automobile Insurance Act,* supra note 389, s 14.
[400] *Automobile Insurance Act,* supra note 389, s 24.
[401] *Automobile Insurance Act,* supra note 389, s 73.

dependents are also provided by the Société de l'assurance automobile du Québec, consisting of a death benefit plus up to 15 hours of psychological treatment.[402]

The Quebec system is considered to be a collectivisation of road risks.[403] Its income is composed 75% from annual contribution of owners of registered vehicles, 15% from the attainment of driver's licences and 10% from interests and taxes over gasoline.[404] It is, therefore, paid by drivers, which consist of the road user category that promote road risks. The Automobile Insurance Act does not forget the costs of road violence imposed on the public health services. It determines that the Société de l'assurance automobile du Québec pays into the Consolidated Revenue Fund the total cost of health services required as a result of automobile incidents.[405]

The success of the Quebec system is such that it is suggested to be implemented in France,[406] whose strict liability system is also deemed to have culminated in positive results.[407] Lawyers, however, have criticized the system, considering unfair that all victims, including criminals, receive the same treatment.[408] Negative consequences have also been reported, stating that "road accidents and victims" have increased after the law, although at an amount not "significant in a statistical sense."[409] Marc Gaudry believes

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[402] *Automobile Insurance Act,* supra note 389, s 62.
[403] Lelièvre-Boucharat, *supra* note 386 at 182.
[404] *Ibid* at 194.
[405] *Automobile Insurance Act,* supra note 389, ss 155.1-155.2.
[406] Lelièvre-Boucharat, *supra* note 386.
[407] Tunc, *supra* note 277 at 339.
[408] Barreau du Québec, "Vingt ans déjà! : La réforme de l'assurance automobile" (1 February 1998), online: Barreau du Québec <https://www.barreau.qc.ca/pdf/journal/vol30/no2/nofault.html>.
[409] Marc Gaudry, *The Effects on Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act* (Département de sciences économiques & Université de Montréal, 1986) at 21.

this increase was due to factors unrelated to the no-fault characteristic of the system.[410] Indeed, it is possible that drivers tend to be less concerned about driving carefully, since their behaviour on the road do not correspond to liability for damages that they might inflict. According to Marcel Boyer and Georges Dionne, the increase on road casualties could be avoided or reduced with an "adequate pricing scheme," together with proper penalties for traffic violations.[411]

Despite its imperfections, it is hard to deny that the Quebec system is better than the Ontario system when it comes to third-party bodily injury compensation. Pedestrians and cyclists are better served with tools to quickly receive compensation for automobile-related damages in Quebec. In Ontario, the insurance system aims solely to protect the driver against liability that may arise due to negligent driving. It was never intended to protect pedestrians and cyclists, who are left with the traditional tort system to seek compensation for their losses. Ontario, however, also has the option of adopting strict liability for third-party damages in its tort system, which would be automatically covered in the current insurance system. The lack of interest in driving carefully, which may be a factor in the Quebec regime, would be overcome by the risk of an increase in the insurance premium of a driver who is involved in a traffic incident.

[410] Gaudry cites three main factors: "(i) forcing 14-18% of uninsured vehicles to carry insurance, (ii) removing the notion of fault for bodily damages and (iii) charging a flatpremium insurance premium for bodily damages independently from the driver's safety record." Gaudry, *supra* note 409.
[411] Boyer & Dionne, *supra* note 388 at 191–192.

CHAPTER 5
CONCLUSION

Road violence is not always seen as road violence. The words used to describe the bloodshed in our public spaces tends to make it seem less outraging. "Accident" has become the standard term used to refer to traffic occurrences, regardless of the fact that a series of decisions had to be made in order for them to happen. Reports have been written as if cars, buses, and trucks went around the city by themselves hitting people, with headlines such as "truck kills a cyclist."[412]

If somebody from the nineteenth century was suddenly transported to current times, they would probably feel surprised and scared by the current picture of road violence. The simple act of moving around the city has become a dangerous activity. People talk about helmets for cycling to work, as if the need of head protection against violence in the city was completely natural.

This surprise over road violence, however, would be mitigated if the same person lived throughout the twentieth century until today. They would see the advent of the car and all the promises that it made to the future of cities. They would get involved in the atmosphere of prosperity that the car promoted through intense advertising bombardments. The idea that the car belongs on the road brought with it the idea that the violence attached to it also does. The logic goes: if it is true that the road has dangerous cars, then pedestrians have to be careful as they cross. Then cyclists have to wear helmets. If the pedestrian or the cyclist does not comply with the new standard of care

[412] Ellie Cambridge, "Cyclist Dies After Being Hit by a Lorry in Central London", (15 August 2018), online: *The Sun* <https://www.thesun.co.uk/news/7020474/cyclist-dies-after-being-hit-by-a-lorry-in-central-london/>.

designated to them, all the consequences, as severe as they may be, are due to their own fault.

Law, as a product of its time, followed the same path. In the beginning, some reluctance was shown to leaving victims were with no compensation at all. It would take years until the courts, as society did, internalized the idea that pedestrians and cyclists as victims of road violence are to be left empty-handed if the driver was not negligent. After it was internalized, though, decisions on the topic became a mere technical matter, with all reluctance gone. Sometimes, as in British Columbia, the wording in decisions suggest that the adjudicator feels a sense of justice in leaving the victim unprotected, as if small mistakes should have consequences as severe as having a car thrown at one's body.[413]

Fortunately, the same history was not followed in all parts of the world. In France and Germany, the revulsion against road violence was quickly transformed into law, which gave the keeper of a motor vehicle the responsibility of ensuring that the existence of that property will not cause damages to anyone. In a different manner, Quebec managed to relocate the costs of automobile damage to the drivers. In these jurisdictions, the most important factor, instead of a moral debate over the conduct of the driver, is to secure the protection of the victim.

In the common law world, voices of those concerned with the victims did exist, but were not heard. In 1982, Lord Denning wrote:

> In the present state of motor traffic, I am persuaded that any civilized system of law should require, as a matter of principle, that the person who uses this dangerous instrument on the roads dealing death and destruction all around - should be liable to make compensation to anyone who is

[413] See *Ormiston*, *supra* note 171.

> killed or injured in consequence of the use of it. There should be liability without proof of fault. To require an injured person to prove fault results in the gravest injustice to many innocent persons who have not the wherewithal to prove it.[414]

There is still time to change the system in order to better protect the victims of road violence in Ontario. The province already has both a no-fault insurance system, which does not cover damages caused to a third party, and a mandatory third-party insurance system. It only needs to choose between establishing strict liability for damage caused by road violence, which would be automatically covered by the third-party insurance that already exists, and broadening the scope of the no-fault insurance system, in order to secure compensation for damages caused to third parties, with no discussion over fault whatsoever. Both of these measures can be taken by the legislature. However, it is never too late for the courts to re-examine their approach to road violence tort cases and adopt a strict liability regime similar to France's and Germany's, recognizing the act of driving as a producer of risks.

A fairer tort system is likely to affect new technologies. A driver tends to be more personally interested in automobiles that automatically avoid collisions with pedestrians and cyclists if they know they will be held liable regardless of fault. Autonomous vehicles are also affected, since strict liability would increase the costumers' interest in purchasing the safest vehicle as possible. Indeed, autonomous vehicles open a new page of tort law discussions. Their novelty creates a sense of danger which results in measures such as the one in Germany, which increased the strict liability compensation amount for damages caused by autonomous vehicles.[415] Apart from changing tort law to

[414] Lord Denning, *What Next in the Law* (London: Butterworths, 1982) at 128.
[415] §12 Road Traffic Act (Germany).

accommodate autonomous vehicles, it is important to address how autonomous vehicles should affect our understanding of tort law for regular vehicles. If it is true that autonomous vehicles should be treated by tort law as something capable of causing injuries and death, regular vehicles should be treated the same way. It seems that the perception of the danger caused by autonomous vehicles is now somewhat similar to the perception of the danger of regular motorized vehicles in the beginning of the twentieth century, when every death was received with popular anger. Perhaps the advent of this new technology will help us bring back the perception that the use of motor vehicles, autonomous or not, create unjust risks to other people. Different perceptions over autonomous vehicles may be categorized into new technological frames, as happened with regular automobiles, allowing the comparison of how the danger of both – autonomous and non-autonomous vehicles – was perceived in their advent.

More study on tort law regarding road violence is also necessary in the area of liability of public authorities. Municipalities have been held liable for defects on road design that cause collisions.[416] However, there is a lack of discussion on the broad responsibility of municipalities for road violence by incentivising motor vehicle use through city planning. Apart from tort law, planning law and criminal law should also be addressed under the perspective of cycling law. The findings of this thesis may also be included in road safety policies such as Vision Zero. Although Vision Zero intends to eventually eliminate all road deaths and heavy injuries,[417] it is important to ensure that, while this goal is not achieved, all road violence victims are compensated for their losses.

[416] See *Repic v Hamilton (City of)*, *supra* note 191.
[417] John Whitelegg & Gary Haq, *supra* note 244 at 1.

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